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SUPREME COURT

In the Supreme Court of the United States

OCTOBER TERM, 1914

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, AND CHARLES BAKER, PLAINTIFFS IN ERROR,

v.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

Also eight other cases standing for hearing with the preceding case, viz:

JOSEPH E. ARNOW, PLAINTIFF IN ERROR, v. THE UNITED STATES OF AMERICA.

ALFRED F. CRANE, PLAINTIFF IN ERROR, v. THE UNITED STATES OF AMERICA.

OTTO WAGENKNECHT, PLAINTIFF IN ERROR, v. THE UNITED STATES OF AMERICA.

WALTER WAGENKNECHT, PLAINTIFF IN ERROR, v. THE UNITED STATES OF AMERICA.

LOUIS KRAMER AND MORRIS BERGER, PLAINTIFFS IN ERROR, v. THE UNITED STATES.

LOUIS KRAMER, PLAINTIFF IN ERROR, v. THE UNITED STATES.

EMMA GOLDMAN AND ALEXANDER BERKMAN, PLAINTIFFS IN ERROR, v. THE UNITED STATES.

ALBERT JONES, APPELLANT, v. E. W. DONALDSON, DEPUTY UNITED STATES MARSHAL, AND M. C. WHITTLE, JAILOR OF RICHMOND COUNTY, GEORGIA.

BRIEF FOR THE UNITED STATES.

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SELECTIVE DRAFT LAW CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, AND CHARLES BAKER, PLAINTIFFS IN ERROR, v. THE UNITED STATES OF AMERICA. — No. 656.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

JOSEPH F. ARVER, PLAINTIFF IN ERROR, v. THE UNITED STATES OF AMERICA. — No. 663.

ALFRED F. GRAHL, PLAINTIFF IN ERROR, v. THE UNITED STATES OF AMERICA. — No. 664.

OTTO WANGERIN, PLAINTIFF IN ERROR, v. THE UNITED STATES OF AMERICA. — No. 665.

WALTER WANGERIN, PLAINTIFF IN ERROR, v. THE UNITED STATES OF AMERICA. — No. 666.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

LOUIS KRAMER AND MORRIS BECKER, PLAINTIFFS IN ERROR, *v.* THE UNITED STATES.	No. 680.
LOUIS KRAMER, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.	No. 681.
EMMA GOLDMAN AND ALEXANDER BERKMAN, PLAINTIFFS IN ERROR, *v.* THE UNITED STATES.	No. 702.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

ALBERT JONES, APPELLANT, *v.* H. W. PERKINS, DEPUTY UNITED STATES MARSHAL, AND M. G. WHITTLE, JAILOR OF RICHMOND COUNTY, GEORGIA.	No. 738.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These cases are alike in that all of them are brought to this court by direct writ of error or appeal under section 238 of the Judicial Code. All of them assert as a basis for jurisdiction the unconstitutionality of the Selective Draft Law of May 18, 1917 (Public No. 12, 65th Cong.).

They are further alike in that the only section of that law with which any of the plaintiffs in error have so far come into collision is section 5, which provides—

> That all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act upon the publication of said proclamation or other notice as aforesaid given by the President or by his direction; and any person who shall willfully fail or refuse to present himself for registration or to submit thereto as herein provided, shall be guilty of a misdemeanor and shall, upon conviction in the dis-

trict court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and shall thereupon be duly registered: *Provided*, That in the call of the docket precedence shall be given, in courts trying the same, to the trial of criminal proceedings under this Act: *Provided further*, That persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this Act provided: *Provided further*, That in the case of temporary absence from actual place of legal residence of any person liable to registration as provided herein such registration may be made by mail under regulations to be prescribed by the President.

Thus plaintiffs in error Joseph F. Arver (No. 663), Alfred F. Grahl (No. 664), Otto Wangerin (No. 665), Walter Wangerin (No. 666), and Louis Kramer (No. 681) were indicted and convicted of having wilfully failed and refused to present themselves for registration or to submit thereto as in said section provided.

Appellant Albert Jones (No. 738) was taken before a United States Commissioner for the Southern District of Georgia upon a warrant charging the same offense, and, in default of bail, was committed to answer an indictment. He thereupon sued out

a writ of habeas corpus from the District Court of the United States for that district, which court, upon hearing, dismissed the petition. 243 Fed. 997. From this order he appeals.

Plaintiffs in error Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker (No. 656) were indicted in the District Court of the United States for the Northern District of Ohio under section 5 aforesaid and section 332 of the Criminal Code upon the charge that they did unlawfully aid, abet, counsel, command, induce, and procure one Alphons J. Schue in unlawfully and wilfully failing and refusing to present himself for registration and to submit thereto; while plaintiffs in error Louis Kramer and Morris Becker (No. 686) and plaintiffs in error Emma Goldman and Alexander Berkman (No. 702) were indicted in the District Court of the United States for the Southern District of New York under section 5 aforesaid and sections 37 and 332 of the Criminal Code, and were convicted of the offense of conspiring to aid, abet, counsel, command, induce, and procure divers persons to wilfully fail and refuse to present themselves for registration and to submit thereto.

All of the cases challenge upon various grounds the constitutionality of the Selective Draft Act as a whole and of various provisions thereof. In some of the constitutional objections urged it is clear that none of these plaintiffs in error has any personal interest, since their rights have not yet been infringed.

All of the objections are believed to be so entirely without foundation, either in reason or precedent, that a motion to dismiss the writs of error and the appeal as frivolous would properly lie.

In *Ruthenberg and others* v. *The United States*, No. 656, *Louis Kramer and Morris Becker* v. *The United States*, No. 680, and *Berkman and Goldman* v. *The United States*, No. 702, errors are assigned aside from the constitutional question. In the latter two cases the sole additional question is whether the facts warranted the convictions. In the *Ruthenberg* case it is contended that various trial proceedings violated the Constitution. In all three cases, we submit that if the constitutional questions under the act are so lacking in merit as to warrant dismissal of the writs of error the other assignments must fall also.

The Government's brief, therefore, is divided into two parts: Part one, *the constitutionality of the act*, in which an effort is made to answer *seriatim* all the various grounds to the contrary which are urged by any of the plaintiffs in error; and, part two, *other errors assigned*.

PART ONE.

THE CONSTITUTIONALITY OF THE ACT.

BRIEF OF ARGUMENT.

I. Congress has power to raise armies for both domestic and foreign service by selective draft. Constitution, Article I, section 8.

1. The power "to declare war" includes the power to compel military service.

2. Congress may compel citizens to serve in the land forces under the power "to raise and support armies."

(*a*) That the power to compel military service is an incident of sovereignty appears from the custom of nations.

(*b*) The compulsory draft was a normal method of raising armies in the United States at the time the Constitution was adopted.

(*c*) The history of this clause in the Convention shows a definite intent not to limit the Nation to voluntary enlistments.

(*d*) The history of the times shows that a prime object of the Constitution was to cure the impotence of the Continental Congress directly to require military service from the citizens of the States.

(*e*) Our national history demonstrates the existence of the power by its exercise.

(*f*) The decisions of the courts uniformly recognize the power of the Government to compel military service.

(*g*) There is not, as asserted, any common-law right of a soldier not to be sent out of the country.

II. The Selective Draft Law infringes no provision of the Constitution concerning the militia.

1. A citizen is not exempt from military service in the National Army merely because he is also a militiaman.

(*a*) The power granted to Congress over the militia of the States (Constitution, Art. I, sec. 8, clauses 15, 16) is not in limitation but in extension of the power to raise an army (clause 12).

(*b*) The draft of a citizen into the armed forces of the United States infringes no reserved right of the States over the militia.

2. Constitutional restrictions concerning militia service are not material in these cases because the duty enforced by the draft law is not that of militiamen but of citizens.

(*a*) Plaintiffs in error were drafted not as militiamen but as citizens of the United States.

(*b*) Members of the National Guard also are called out, not as militiamen but as citizens of the United States.

3. Assuming *arguendo* that plaintiffs in error are called as militiamen and are ordered abroad, they can not obtain relief in the courts.

III. The Selective Draft Law imposes neither slavery nor involuntary servitude.

IV. The act is not unconstitutional on the ground that State officials aid in its enforcement.

V. The act does not delegate legislative authority to administrative officials.

VI. The act does not infringe the provisions of the Constitution concerning the judicial power. Article I, section 8, clause 9; Article III, sections 1 and 2.

VII. The due process clause is not violated.

VIII. The Selective Draft Law neither establishes a religion nor prohibits its free exercise.

IX. Other constitutional questions under the act.

ARGUMENT.

I.

CONGRESS HAS POWER TO RAISE ARMIES FOR BOTH DOMESTIC AND FOREIGN SERVICE BY SELECTIVE DRAFT. CONSTITUTION, ARTICLE I, SECTION 8.

The highest duty of every citizen is to serve his country in time of need. The duty of the arms-bearing population to respond to the call of the Nation is inherent in the nature of citizenship. The obligation has been explained as in the nature of an implied contract. In the early constitutions of five States it was agreed that the individual consents to render military service in return for protection to life, liberty, and property (*infra*, p. 18). Vattel, whose "Law of Nations" appeared in 1758, on the other hand, emphasized the rights of the sovereign, rather than the duties of the subject. After stating that "no person is naturally exempt from taking up

arms in defense of the State, the obligation of every member of society being the same," he submitted that "society can not otherwise be maintained." Book 3, c. 2, secs 8 and 10. This obligation of the citizen to his nation is fundamental and universally recognized.

It would be strange indeed if, alone among the nations, the Government of the United States, ordained and established to "provide for the common defence" and to "secure the blessings of liberty to ourselves and our posterity," were prohibited by its organic law from using those means approved by the common experience of mankind as essential to such protection and security. It would be a contradiction in terms to declare the Government of the United States a sovereign, endowed with all the powers necessary for its existence, yet lacking in the most essential of all—the power of self-defense. And it would be a melancholy reflection upon the Constitution making of 1787, coming as it did after the disastrous effects of the Confederation's lack of power to command directly the military service of the citizens of the States had been deeply felt, if the Government which then arose were no better equipped than its predecessor.

As might be anticipated, therefore, the Constitution is explicit in its grants of plenary power. Article I, section 8, provides:

> The Congress shall have power—
>
> (Cl.) 1. To lay and collect taxes, duties, imposts and excises, to pay the debts and

> provide for the common defence and general welfare of the United States; * * *
>
> (Cl.) 11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;
>
> (Cl.) 12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;
>
> (Cl.) 13. To provide and maintain a navy;
>
> (Cl.) 14. To make rules for the government and regulation of the land and naval forces;
>
> (Cl.) 18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the Government of the United States, or in any department or officer thereof.

The purpose of these wide grants of power was expressed in the preamble:

> We the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

1. The power to declare war includes the power to compel military service.

The power granted to declare war involves the power to carry it on successfully. The means necessary to that end are granted. Article I, section 8,

clause 18, makes this clear. To quote again from Vattel:

> As war cannot be carried on without soldiers, it is evident that whoever has the right of making war, has also naturally that of raising troops. (Book 3, c. 2, sec. 7.)

In *United States* v. *Sugar*, 243 Fed. 423, 436, the court, in quoting from *Knoedler* v. *Lane*, 45 Pa. St. 238, said:

> * * * "The power to declare war necessarily involves the power to carry it on, and this implies the means, saying nothing now of the express power 'to raise and support armies,' as the provided means. * * * But the power to carry on war, and to call the requisite force into service, inherently carries with it the power to coerce or draft. A nation without the power to draw forces into the field, in fact would not possess the power to carry on war. The power of war, without the essential means, is really no power; it is a solecism."

2. Congress may compel citizens to serve in the land forces under the power "to raise and support armies."

As to method, the power conferred upon Congress to raise armies is as broad as language can make it. The only restriction refers to appropriations in support of the armies raised. There is no proviso such as plaintiffs in error seek to insert:

> *Provided*, That no person shall be compelled to do military duty otherwise than by voluntary enlistment.

Nor is there any limitation in any other section of the Constitution.

We deal here, not with powers implied but with express grants. Congress is expressly empowered to use all means necessary and proper to the exercise of the power to raise armies. Any method may be employed within the discretion of Congress which does not in itself violate rights guaranteed by other clauses of the Constitution. Voluntary enlistment if deemed appropriate, may be tried. If under the circumstances Congress provides for a selective draft as the means considered necessary, the Constitution contains no prohibition. Authorization to employ either method is expressed.

In the classical language of the Chief Justice in *McCulloch* v. *Maryland*, 4 Wheat. 316:

> (p. 407) * * * In considering this question, then, we must never forget that it is a *constitution* we are expounding.
>
> (p. 409) The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.
>
> (p. 415) * * * The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence

> could insure, their beneficial execution. This could not be done, by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.

Only sheer hardihood would seriously deny that among the appropriate means to which Congress may resort in raising armies is the selective draft. Indeed, it requires no extended argument to show that it is not only an appropriate means but under the conditions of modern warfare the most prudent, just, and equitable method which can be employed. Under present conditions war is not a matter of men, but of nations. All of the resources of the

combatants, human and material, are thrown into the scale. As it is in the power of the Government to compel, so it is the duty of all its citizens to give, regardless of personal preference, the service which they can most efficiently render. Those who bear the responsibility of leadership must have also the power to assign every citizen to the station he is best qualified to fill. The armies in the field must be equipped and maintained by the producers and artisans at home, and men must serve the one or the other purpose as the necessities of the occasion require. Nor is it any longer just to leave the performance of military duties only to the most ardent and patriotic, instead of distributing them with equity over the population as a whole. It can not be necessary to vindicate the legislative discretion by enlarging upon this theme.

(a) **That the power to compel military service is an incident of sovereignty appears from the custom of nations.**

The Constitution establishes the United States of America as a sovereign nation. In its field, to carry out powers expressly granted, it has all the rights of any similar sovereignty. These include, for instance, the power to take dependencies. *De Lima* v. *Bidwell*, 182 U. S. 1; *Mormon Church* v. *United States*, 136 U. S. 1, 42. Incident to its control over international relations, as every other nation, it may exclude aliens. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 705–708, 711. Like other sovereigns, it may exercise the power of eminent domain. *United States* v. *Jones*, 109 U. S. 513,

518. We may test its right to employ the power of conscription by the same comparison.

That compulsory military service is enforced by practically all the nations of the globe at the present time is a matter of common knowledge. Of this the court may take judicial notice. References properly and readily available to the court are as follows: The Americana, vol. 5, title "Conscription"; Ency. Brit., 11th ed., vol. 6, title "Conscription"; Pamphlet issued by Army War College, November, 1915, entitled "Statistical Comparison of Universal and Voluntary Military Service." [1]

See the conscription act of Great Britain, entitled "Military Service Act," January 27, 1916, 5 and 6 George V, c. 104, p. 367; amended by the Military Service Act of 1916, May 25, session 2, 6, and 7, George V, c. 15, p. 33; the recent Canadian conscription act, entitled "Military Service Act" of August 27, 1917, expressly providing for service abroad (printed in the Congressional Record of September

[1] The Statesman's Yearbook for 1917 cites the following governments as enforcing military service: Argentine Republic, p. 656; Austria-Hungary, p. 667; Belgium, p. 712; Brazil, p. 738; Bulgaria, p. 747; Bolivia, p. 728; Colombia, p. 790; Chile, p. 754; China, p. 770; Denmark, p. 811; Ecuador, p. 820; France, p. 841; Greece, p. 1001; Germany, p. 914; Guatemala, p. 1009; Honduras, p. 1018; Italy, p. 1036; Japan, p. 1064; Mexico, p. 1090; Montenegro, p. 1098; Netherlands, p. 1119; Nicaragua, p. 1142; Norway, p. 1152; Peru, p. 1191; Portugal, p. 1201; Roumania, p. 1220; Russia, p. 1240; Serbia, p. 1281; Siam, p. 1288; Spain, p. 1360; Switzerland, p. 1337; Salvador, p. 1270; Turkey, p. 1353.

20, 1917, 55th Cong. Rec., p. 7959); the Conscription Law of the Orange Free State, Law No. 10, 1899; Military Service and Commando Law, sections 10 and 28; Laws of Orange River Colony, 1901, p. 855; of the South African Republic "De Locale Wetten en Volksraadsbesluiten der Zuid-Afr. Republiek," 1898, Law No. 20, pp. 230, 233, article 6, 28; Constitution, German Empire, April 16, 1871, Art. 57, 59; Dodd, 1 Modern Constitutions, p. 344; Gesetz, betreffend Aenderungen der Wehrpflicht, vom 11 Feb. 1888, No. 1767, Reichs-Gesetzblatt, p. 11, amended by law of July 22, 1913, No. 4264, RGBl., p. 593; Loi sur de recrutement de l'armee of 15 July, 1889 (Duvergier, vol. 89, p. 440), modified by act of 21 March, 1905 (Duvergier, vol. 105, p. 133).

The treaties of the United States afford further evidence of the prevalence of compulsory military service in other countries, for provisions are common in them which exempt consuls and citizens of the United States from military service in the forces of the treaty nation.[1] In several naturalization treaties

[1] See Malloy, Treaties, Conventions, etc. (1910), vols. 1, 2; edition by Charles (1913), vol. 3; Argentine Republic, 1853, Art. X, p. 23; Austria-Hungary, 1870, Art. II, 40; Belgium, 1880, Art. III, 95; Congo, 1891, Art. III, 329; Costa Rica, 1851, Art. IX, 344; Greece, 1902, Art. III, 856; Hayti, 1864, Art. V, 922; Honduras, 1864, Art. IX, 955; Italy, 1871, Art. III, 970; Japan, 1894, Art. I, 1029; Japan, 1911, Art. I, Charles, vol. 3, p. 78; Mexico, 1831, Art. IX, 1088; Paraguay, 1859, Art. XI, 1367; Roumania, 1881, Art. III, 1506; Servia, 1881, Art. IV, 1615; Spain, 1902, Art. V, 1703; Sweden, 1910, Art. III, Charles, vol. 3, 113; Switzerland, 1850, Art. II, 1764; Salvador, 1870, Art. 29, 1560; Tonga, 1886, Art. IX, 1782; Venezuela, 1860, Art. II, 1846.

also it is provided that citizens of the treaty nation in certain cases may be compelled to render military service on return to their original land.[1]

(b) The compulsory draft was a normal method of raising armies in the United States at the time the Constitution was adopted.

The most reluctant must concede that the grant of power to raise armies includes the use of such means as were known and customarily exercised in this country in 1787. It is important therefore to note that the compulsory draft was expressly recognized in many constitutions of the several States, was enforced by the States for local purposes in calling out the militia, and also for obtaining levies to fill up the ranks of the Continental Army.

The constitutions of five States during the Revolutionary War period express the principle of universal military service. Article 8 of the constitution of Pennsylvania of 1776 provides:

> That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto. (Thorpe, American Charters, Con-

[1] Austria-Hungary, 1870, Art. II (Malloy, vol. 1, p. 46); Baden, 1868, Art. II (*id.* 54); Belgium, 1868, Art. III (*id.* 80); Sweden and Norway, 1869, Art. II (*id.* 1760); Wurttemberg, 1868, Art. II (*id.* 1897).

stitutions and Organic Laws, vol. 5, pp. 3081, 3083.)[1]

New Hampshire, in the constitution of 1784, part 1, article 13, provided:

> No person who is conscientiously scrupulous about the lawfulness of bearing arms shall be compelled thereto provided he will pay an equivalent.[2] (Thorpe, vol. 4, p. 2455.)

Militia duty was imposed upon all arms-bearing citizens of the original thirteen States during the 18th century. This duty was not regarded as voluntary. Militia commanders were given discretionary power by the State statutes to detach or to draft militiamen either by classes or as individuals. Exemptions were

[1] See language almost precisely similar in the Constitution of Vermont, 1777, c. 1, Art. 9 (Thorpe, vol. 6, pp. 4747, 3740); Vermont, 1786, c. 1, Art. 10 (*id.*, vol. 6, 3753); Vermont, 1793, c. 1, Art. 9 (*id.*, vol. 6, 3762, 3763); New York, 1777, Art. 40 (*id.*, vol. 5, 2637); Massachusetts, Bill of Rights, 1780, Art. 10 (*id.*, vol. 3, 1891); New Hampshire, 1784, pt. 1, Bill of Rights, Art. 12 (*id.*, vol. 4, 2455); Constitution of New Hampshire, Bill of Rights, Art. 12 (*id.*, vol. 4, 2471).

[2] Similar provisions were in the constitutions of New York, 1777, art. 40 (Thorpe, vol. 5, 2637); Pennsylvania, 1776, art. 8 (*id.*, vol. 5, 3083); Vermont, 1777, c. 1, art. 9 (*id.*, vol. 6, 3740–41); Vermont, 1786, c. 1, art. 10 (*id.*, vol. 6, 3753).

Other provisions in the early constitutions for compulsory military service are as follows: Massachusetts, 1780, pt. II, c. 2, art. 7 (Thorpe, vol. 3, 1901; New Hampshire, 1784, pt. 2, Executive Power (*id.*, vol. 4, pp. 2463–2464); Delaware, 1776, art. 9 (*id.*, vol. 1, 562, 564); Maryland, 1776, art. 33 (*id.*, vol. 3, 1686, 1696); Virginia, 1776, Militia (*id.*, vol. 7, p. 3817); Georgia, 1777, art. 33, art. 35 (*id.*, vol. 2, 777, 782).

granted usually for State officials and workmen engaged in peculiarly vital industrial pursuits and to Quakers, Mennonites, and other conscientious objectors. The statutes are given in Appendix "A," *infra*, p. 123.

The draft was several times appealingly recommended by the Continental Congress to the States as a means of recruiting the Continental Army. The Continental Congress, under the Articles of Confederation, articles 7 and 9, made requisitions on the States for quotas of men for the Continental battalions. Since the requisitions were not binding, the acts of the Congress took the form of suggestions to the States. The suggestions were earnestly made. The Journals of the Continental Congress afford ample demonstration that the draft was a normal method of raising armies at the time.[1]

[1] On April 14, 1777, it is recorded:

"*Resolved*, That if the several quotas of the States can not be furnished by any of the means recommended in the foregoing resolutions [bounties and exemptions to militiamen who furnish recruits], or by any other means by the said legislatures devised before the 15th day of May next, it is recommended to each State to cause indiscriminate drafts to be made from their respective militia.

"That it be recommended to the said legislatures to apply all of the means by these resolutions recommended in the manner which they shall judge most effectual for speedily completing the army, and in case they shall prove unsuccessful, that they cause drafts aforesaid to be made." Vol. 7, Ford's edition, Library of Congress, pp. 262-263; vol. 2, edition by Way & Gideon, p. 91.

February 26, 1778: "*Resolved*, That the several States hereafter named be required forthwith to fill up by drafts

Complying with the recommendations of the Continental Congress the States enacted statute after statute providing for drafting or detaching citizens

from their militia, or in any other way that shall be effectual, their respective battalions of Continental troops, according to the following arrangement: * * *

"That all persons drafted shall serve in the Continental battalions of their respective States for the space of nine months * * *." Journals of Congress, vol. 4, pp. 85 to 87; Folwell's Press, 1800. See Journals of Congress, edition of Way & Gideon, 1823, vol. 2, pp. 458, 459; Ford's edition, Library of Congress, vol. 10, pp. 199, 200.

March 9, 1779: "*Resolved*, That the above-recited clause of the said act of Congress [providing for bounties for voluntary enlistment] be repealed, and that it be earnestly recommended to the several States to make up and complete their respective battalions to their full complement by drafts, or in any other manner they shall think proper, and that they shall have their quotas of deficiencies ready to take the field, and to march to such place as the Commander-in-chief shall direct without delay." Folwell's edition, vol. 5, p. 70; Way & Gideon's edition, vol. 3, p. 223; Ford's edition, Library of Congress, vol. 13, p. 299.

Washington renewed his recommendation to Congress on November 18, 1779, for a draft as the means of maintaining the army. Sparks Writings, vol. 6, pp. 401, 404. Committee reports on the matter were made in Congress December 7, 1779. Ford's edition, vol. 15, p. 1358; Dec. 14, 1779, *id.*, vol. 15, p. 1376. An annual draft act passed in accordance with the recommendation of the Commander-in-chief on December 18, 1779. *id.*, vol. 15, p. 1393; edition by Way & Gideon, vol. 3, p. 413. A further draft act was passed February 9, 1780, Ford's edition, vol. 16, p. 150; Way & Gideon's edition, vol. 3, p. 432; Folwell's edition, vol. 6, p. 18.

A report that a spirit of enlisting among drafted men was taking place is made in vol. 3, Way & Gideon's edition, p. 38; Folwell's edition, vol. 4, p. 361.

to fill up the Continental battalions. Appendix "B," *infra*, p. 131. These statutes, it is submitted, conclude the present cases in so far as they depend upon the meaning which the framers of the Constitution attached to the power to raise armies.

(c) The history of this clause in the Convention shows a definite intent not to limit the nation to voluntary enlistments.

In the Constitutional Convention of 1787 restrictions upon the grant of power to raise armies were proposed as amendments and voted down. The first drafts of the Constitution reported by the Committee on Detail empowered Congress "to make war, to raise armies, to build and equip fleets." Supp. to Elliot's Debates, vol. 5, pp. 378, 379, proceedings of August 6, 1787. On August 18 Messrs. Martin and Gerry moved to amend the clause as follows: "*Provided*, That in time of peace the Army shall not consist of more than ——— thousand men." The following proceedings are then reported:

> Gen. Pinckney asked whether no troops were ever to be raised until an attack should be made on us.
>
> Mr. Gerry. If there be no restriction, a few States may establish a military government.
>
> Mr. Williamson reminded him of Mr. Mason's motion for limiting the appropriation of revenue as the best guard in this case.
>
> Mr. Langdon saw no room for Mr. Gerry's distrust of the representatives of the people.
>
> Mr. Dayton. Preparations for war are generally made in peace, and a standing force of

> some sort may, for aught we know, become unavoidable. He should object to no restrictions consistent with these ideas.
>
> The motion of Mr. Martin and Mr. Gerry was disagreed to *nem. con.*
>
> (Farrand's Records of the Federal Convention, vol. 2, p. 323, 330; Supp. to Elliot's Debates, vol. 5, p. 443.)

On September 5, 1787, the limitation which now appears "But no appropriation of money to that use shall be for a longer term than two years," was added. Supp. to Elliot's Debates, vol. 5, pp. 510, 511; Farrand, vol. 2, pp. 505, 509, 570, 595. Mr. Gerry refused to sign the Constitution on September 15, giving as one of his grounds of objection that Congress would have the power to raise armies and money without limit. Elliot, vol. 5, p. 553.

The power to compel military service was even more precisely considered. Virginia and North Carolina and Rhode Island in ratifying the Constitution each submitted amendments to limit the power of Congress to raise armies by draft. Virginia proposed to limit the power over the religious objector. On June 26, 1788, she submitted an amendment for the consideration of the first Congress which should assemble under the Constitution, as follows:

> [19th section of the Bill of Rights.] That any person religiously scrupulous of bearing arms, ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead. (Journals of Congress, vol. 13,

> Appendix, p. 176, Folwell's Press, 1801; 3 Elliot's Debates, p. 659.)

An amendment in the same terms was submitted by North Carolina in ratifying the Constitution, August 1, 1788. Appendix, Journals of Congress, published by Folwell, 1801, vol. 13, p. 184 *et seq.*; 4 Elliot's Debates, pp. 242, 244, 251, 252.

Rhode Island was more ambitious. On May 29, 1790, the Rhode Island convention proposed an amendment in terms substantially similar to those proposed by plaintiffs in error:

> That no person shall be compelled to do military duty otherwise than by voluntary enlistment, except in cases of general invasion; anything in the second paragraph of the sixth article of the Constitution, or any law made under the Constitution, to the contrary notwithstanding. (1 Elliot's Debates, p. 336.)

The rejection of the many limitations proposed shows not only that the language employed in the Constitution was definitely intended by the Constitution makers to include the power to draft but also that this was the contemporary interpretation.

(d) The history of the times shows that a prime object of the Constitution was to cure the impotence of the Continental Congress directly to require military service from the citizens of the States.

Under the Articles of Confederation the Continental Congress was authorized "to agree upon the number of land forces and to make requisitions upon each State for its quota." The States were to appoint the regimental officers, raise the men, and clothe, arm,

and equip them in a soldier-like manner. Articles 7, 9. 1 Stat. 6, 7. No power over the individual citizens of the State was granted. The Congress had no means of enforcing its requisitions upon the States. 1 Stat. 6, 7. As a result the States responded to the calls of Congress as their own particular necessities dictated. The defect was the occasion of many expressions of anguish by the Commander-in-Chief. Sparks, Writings of Washington, vol. 7, pp. 442, 444. On August 20, 1780, in a letter to the President of Congress, Washington wrote with reference to a plan for providing soldiers:

> The plan for this purpose ought to be of general operation, and such as will execute itself. Experience has shown, that a peremptory draft will be the only effectual one. If a draft for the war or for three years can be effected, it ought to be made on every account. (7 Sparks, Writings of Washington, p. 162.)
>
> It is a thing, that has been all along ardently desired by the army, that every matter which relates to it should be under the immediate direction of Congress. The contrary has been productive of innumerable inconveniences. (7 Sparks, *supra*, 167.)

See also Upton, Military Policy of the United States, pp. 10, 13, 23, 42, 54. The situation during the revolutionary period is described in the Federalist No. 22, p. 143, as follows:

> The power of raising armies, by the most obvious construction of the articles of the Confederation, is merely a power of making

> requisitions upon the States for quotas of men. This practice in the course of the late war, was found replete with obstructions to a vigorous and to an economical system of defense. It gave birth to a competition between the States which created a kind of auction for men. In order to furnish the quotas required of them, they outbid each other till bounties grew to an enormous and insupportable size. The hope of a still further increase afforded an inducement to those who were disposed to serve to procrastinate their enlistment, and disinclined them from engaging for any considerable periods. Hence, slow and scanty levies of men, in the most critical emergencies of our affairs; short enlistments at an unparalleled expense; continual fluctuations in the troops, ruinous to their discipline and subjecting the public safety frequently to the perilous crisis of a disbanded army. Hence, also, those oppressive expedients for raising men which were upon several occasions practiced, and which nothing but the enthusiasm of liberty would have induced the people to endure.

All these things were fresh in the minds of everyone. The first concern was to prevent their repetition.

Madison, in the forty-first number of the Federalist, wrote as follows (p. 276):

> With what color of propriety could the force necessary for defense be limited by those who can not limit the force of offense? If a federal constitution could chain the ambition or set bounds to the exertions of all other nations, then indeed might it prudently chain the dis-

cretion of its own government and set bounds to the exertions for its own safety.

Hamilton also treated of the matter in the Federalist, especially in Nos. 22–25. In the twenty-third number he wrote (p. 152):

> The authorities essential to the care of the common defense are these; to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. *These powers ought to exist without limitation*, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. * * *
>
> (p. 153) And it less is can be shown that the circumstances which may affect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defense and protection of the community, in any matter essential to its efficacy—that is, in any matter essential to the formation, direction, or support of the national forces.
>
> Defective as the present Confederation has been proved to be, this principle appears to have been fully recognized by the framers of

it; though they have not made proper or adequate provision for its exercise. Congress have an unlimited discretion to make requisitions of men and money; to govern the army and navy; to direct their operations. As their requisitions are made constitutionally binding upon the States, who are in fact under the most solemn obligations to furnish the supplies required of them, the intention evidently was that the United States should command whatever resources were by them judged requisite to the "common defense and general welfare." It was presumed that a sense of their true interests, and a regard to the dictates of good faith, would be found sufficient pledges for the punctual performance of the duty of the members to the federal head.

The experiment has, however, demonstrated that this expectation was ill-founded and illusory; and the observations, made under the last head, will, I imagine, have sufficed to convince the impartial and discerning, that there is an absolute necessity for an entire change in the first principles of the system: that if we are in earnest about giving the Union energy and duration, we must abandon the vain project of legislating upon the states in their collective capacities; we must extend the laws of the federal government to the individual citizens of America; we must discard the fallacious scheme of quotas and requisitions, as equally impracticable and unjust. The result from all this is that the Union ought to be invested with full power to levy troops; to build and equip fleets; and to raise the revenues

> which will be required for the formation and support of an army and navy, in the customary and ordinary modes practiced in other governments.

(c) Our national history demonstrates the existence of the power by its exercise.

The history of the Nation is appealed to by the plaintiffs in error as showing the lack of power to compel military service. Briefs, Nos. 663 to 666, pp. 10, 12, 36. The appeal is vain, for while, fortunately, occasions for the draft have been infrequent, it has been resorted to without flinching when the emergency arose.

It was largely by means of forced drafts that the War of Independence was successfully concluded. See Appendices "A" and "B," pp. 123, 131. Near the conclusion of the War of 1812 it seemed that a general draft to recruit the national forces would again be necessary. James Monroe, then Secretary of War, submitted a draft bill to Congress with an argument in its favor so unanswerable that it might well be adopted as the Government's argument on the present hearing. It is printed herewith as Appendix "D," p. 135.

During the Civil War the draft was resorted to upon both sides. President Lincoln declared his view of the matter in no uncertain terms. Said he:

> The principle of draft, which simply is involuntary or enforced service, is not new. It has been practiced in all the ages of the world. It was well known to the framers of our Constitution as one of the modes of raising armies,

> at the time they placed in that instrument the provision that "the Congress shall have power to raise and support armies." It had been used just before in establishing our independence, and it was also used under the Constitution in 1812. Wherein is the peculiar hardship now? Shall we shrink from the necessary means to maintain our free Government, which our grandfathers employed to establish it, and our own fathers have already employed once to maintain it? Are we degenerate? Has the manhood of our race run out? * * *
>
> With these views and on these principles I feel bound to tell you it is my purpose to see the draft law faithfully executed. (Excerpt from President Lincoln's unpublished address, Senate Report No. 22, 65th Cong., 1st sess., 55 Cong. Rec. 923, 924, 925.)

Revised Statutes, section 1998, carried forward from 1865 and amended by act of August 22, 1912, c. 336, 37 Stat. 356, provides for loss of citizenship by anyone "who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service."

Statutes providing for compulsory militia service have been in force from the beginning. See statutes in 17th and 18th centuries, Appendix "A," *infra*, p. 123. Similar present-day militia statutes of various States and Territories are collected in Appendix "C," *infra*, p. 133.

The more important Congressional acts providing for drafting the militia are: Act of Feb. 28, 1795, c. 36, 1 Stat. 424, amended by act of April 18, 1814, c. 82, 3 Stat. 134 (see *Houston* v. *Moore*, 5 Wheat. 1, and *Martin* v. *Mott*, 12 Wheat. 19); and act of July 17, 1862, c. 201, 12 Stat. 597.

(f) The decisions of the courts uniformly recognize the power of the Government to compel military service.

Some *dicta* there are which, by reason of the facility with which they adduce illustrations as facts universally acknowledged, acquire the force of adjudicated cases. Of such character are the repeated passages in the opinions of this court recognizing the power of the Government to draft.

In *Tarble's* case, 13 Wall. 397, 408, holding that the State court has no jurisdiction to release an enlisted man in the hands of Federal officers, Mr. Justice Field said (p. 408):

> Among the powers assigned to the National government is the power "to raise and support armies" and the power "to provide for the government and regulation of the land and naval forces." The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, *whether by voluntary enlistment or forced draft*, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be

> assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offenses, and prescribe their punishment. No interference with the execution of this power of the National government in the formation, organization and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service.

In *Grimley's* case, 137 U. S. 147, 153, involving the validity of an enlistment of a soldier over age, Mr. Justice Brewer said:

> The Government has the right to the military service of all its able-bodied citizens; and may, when emergency arises, justly exact that service from all.

See also *Presser* v. *Illinois*, 116 U. S. 252, 265; *Robertson* v. *Baldwin*, 165 U. S. 275, 282, *infra*, p. 65; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29, *infra*, p. 81; *Butler* v. *Perry*, 240 U. S. 328, 332, 333, *infra*, p. 64.

The Conscription Act of 1863 was held a valid exercise of the power to raise armies. *Kneedler* v. *Lane*, 45 Pa. St. 238; act of March 3, 1863, c. 75, 12 Stat. 731, amended by act of February 24, 1864, c. 13, 13 Stat. 6; act of July 4, 1864, c. 237, 13 Stat. 379; act of March 3, 1865, c. 79, 13 Stat. 487. In *United States* v. *Scott*, 3 Wall. 642, and *United States* v. *Murphy*, 3 Wall. 649, this court, in answering questions certified, construed the act of 1863, and the

amendatory act of 1864, no question of constitutionality being raised.

The validity of the draft acts of the Confederate States during the Civil War was vigorously attacked in the Confederate courts. The pertinent clauses of the constitution of the Confederate States were in precisely the same terms as the similar clauses in the Constitution of the United States. The statutes were sustained as a means of carrying into effect the power "to raise and support armies." *Burroughs* v. *Peyton*, 16 Gratt. 470; *Ex parte Coupland*, 26 Tex. 386; *Jeffers* v. *Fair*, 33 Ga. 347; *Barber* v. *Irwin*, 34 Ga. 27; *Gatlin* v. *Walton*, 60 N. C. 333, 408; *Ex parte Hill*, 38 Ala. 429; *Ex parte Stringer*, 38 Ala. 457; *Parker* v. *Kaughman*, 34 Ga. 136; *Daly & Fitzgerald* v. *Harris*, 33 Ga. Supp. 38, 54; *Simmons* v. *Miller*, 40 Miss. 19; *Ex parte Bolling*, 39 Ala. 609; *In re Emerson*, 39 Ala. 437; *In re Pille*, 39 Ala. 459.

Compulsory militia service has also been enforced by the courts. In *Houston* v. *Moore*, 5 Wheat. 1, and *Martin* v. *Mott*, 12 Wheat. 19, court-martial sentences were sustained against militiamen who failed to respond to the Federal call during the War of 1812. The act of Congress of July 17, 1862, c. 201, 12 Stat. 597, requiring performance of militia duty, was sustained in *McCall's Case*, 15 Fed. Cas. No. 8669, p. 1225; *In re Griner*, 16 Wis. 423; *Druecker* v. *Salomon*, 21 Wis. 621; *In re Spangler*, 11 Mich. 298; *Allen* v. *Colby*, 47 N. H. 544. As to the power of the State to draft see also *Lanahan* v. *Birge*, 30 Conn. 438, 443; *People ex rel. German Ins.*

Co. v. *Williams*, 145 Ill. 573, 583; *In re Dassler*, 35 Kans. 678, 684; *State* v. *Wheeler*, 141 N. Car. 773, 777.

The present Selective Draft Act has been sustained in every case which has come before the courts. Cases in the Federal courts in addition to those now on hearing are *United States* v. *Sugar* (D. C.), 243 Fed. 423; *Angelus* v. *Sullivan* (C. C. A. 2d C.; not reported); *United States* v. *Stephens* (D. C. Del.; not reported); *Ex parte Hackenberg* (D. C. Nor. Ohio; not reported). *United States* v. *Yanyar* (D. C. R. I.; not reported); *United States* v. *Cattell & Phillips* (D. C. S. D. N. Y.; not reported). See also *Claudius* v. *Davie*, 174 Cal. —, 165 Pac. 689.

(g) There is not, as asserted, any common-law right of a soldier not to be sent out of the country.

The fifth assignment of error in the *Jones* case, No. 738, complains of error "in holding that appellant, contrary to his common-law rights as a citizen of the United States, was and is liable to compulsory military service beyond the seas and without the realm of the United States" (brief, p. 6).

Counsel in the *Minnesota* cases, Nos. 663–666, discuss the military obligations of Englishmen (brief, p. 8 *et seq.*). So far as the asserted rights of State militiamen are concerned, discussion is postponed (*infra*, p. 46 *et seq.*).

The status of a citizen properly drafted into the land forces of the United States is that of a soldier no less than the status of one who has voluntarily enlisted. Both must obey the commands of their

superiors. The willingness with which one has become a soldier affords no ground for distinction. Every citizen impliedly consents to become a soldier in case of need. The soldier who, having become such involuntarily, disobeys an order to go to the place where the enemy is to be met is no less a deserter than a volunteer who does the same.

Again, the testimony of history is conclusive. Our armies have served in all parts of the world. The flag has waved over the national forces at Tripoli (Treaty of Peace with Tripoli, 1805, Art. III, 2 Malloy's Treaties, p. 1789); and at Tampico (*Fleming* v. *Page*, 9 How. 603); in Mexico, in China, and in Canada. Our legions have been victorious on the soil of Cuba, Porto Rico and the Philippines, in the Caribbean and across the Pacific.

Such foreign service has never been regarded as illegal. Indeed this court has spoken to the contrary in *Fleming* v. *Page*, 9 How. 603, involving a question as to duties on goods imported from Tampico, Mexico, while that city was occupied by our troops. Mr. Chief Justice Taney said (p. 615):

> As commander-in-chief, he [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. * * * The power of the President under which Tampico and the State of

> Tamaulipas were conquered and held in subjection was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his government.

In the Treaty of Alliance of 1778 with France, in force when the Constitution was adopted, the aid of the United States to France was pledged if war should break out between France and Great Britain (Art. I); conquest of Canada and the Islands of Bermudas by the United States was contemplated (Art. V). 1 Malloy's Treaties, pp. 479–481.

Prior to the adoption of the Constitution in 1787 the militia statutes passed by the Original States frequently provided that the militia forces might be sent into neighboring States. See the following: Maryland, acts of 1778, October, c. 10; Connecticut, Laws 1784, p. 147; Rhode Island, act of December, 1777, pp. 10, 11; New York, April 3, 1778, c. 33; Laws 1777–1784, vol. 1, p. 68; act October 9, 1779, c. 13; Laws, *supra*, p. 159; act of April 4, 1782, 5th sess., c. 27; Laws, *supra*, p. 444, sec. 17; p. 446, sec. 20; Massachusetts Resolves, June, 12, c. 51, 1778, p. 18; Massachusetts Laws, May, 1776, c. 21, p. 89; Laws and Resolves, 1780–1, p. 680, c. 99; Resolve, June 28, 1781; New Hampshire, act March 18, 1780, c. 12, Metcalf's ed., vol. 4, p. 273; North Carolina, November, 1777, c. 19, vol. 24, State Records 128, 1778, 3d sess., c. 1, *id.*, p. 198, May, 1779, c. 1, vol. 24, State Records 254; New Jersey, act September 27, 1777, c. 44, sec. 5, Laws September, 1777, p. 99;

South Carolina, act February 13, 1779, No. 1116. 4 St. L. 465; act February 26, 1782, No. 1154, 9 St. L. p. 682; Pennsylvania, act March 20, 1780, c. 152, 10 St. L., 144, 156. If the contention of counsel be correct, such statutes of the still independent and nonunited States invaded the common-law rights which their citizens had enjoyed as colonists.

Counsel in the *Jones* case, No. 738, speak of "natural rights" (brief, p. 9). There is no natural right to disobey a valid legislative enactment. The notion, moreover, that compulsory military service is contrary to the spirit of democratic institutions (brief, No. 663, pp. 11, 12) is unfounded in fact. Our Constitution implies equitable distribution of the burdens no less than of the privileges of citizenship.

In a matter so fully covered by American precedent there is little need to invoke the history of England. But if it be material, it is easy to show that English history itself does not support, as counsel seem to think, the alleged right to be free from conscription for foreign service. The recent acts in England and Canada, *supra*, p. 16, indicate the parliamentary view that the voluntary recruiting system was followed for many years only as a matter of policy. See May's Constitutional History of England, vol. 2, pp. 136–138; vol. 3, pp. 280–283.

The military obligation of Englishmen in the days prior to the Revolutionary War is uncertain in extent. The militia existed prior to the Norman Conquest. Blackst. Comm., vol. 1, *p. 409. Thereafter

the militia obligation was not forgotten (see Assize of Arms A. D. 1181; Stubbs, Select Charters, 8th ed., p. 153; Adams and Stephens, Documents of Constitutional History, p. 23; Stubbs, Constitutional History, Clarendon Press, 2d ed., vol. 1, p. 591; Statute of Winchester A. D. 1285, 13 Edward I, c. 6, 1 Stat. L. England, p. 234); also the feudal obligation of knights was enforced (Blackst. Comm., vol. 1, *p. 410); as well as the subject's obligation of allegiance. The feudal obligation apparently was not merged in the obligation to bear arms. Pollock and Maitland "History of English Law," vol. 1, p. 234.

Various phases of the military obligation gave rise to struggle between the Crown and the representatives of the people. The contest of the Crown for the right to keep a standing army in time of peace without the consent of Parliament was settled by the Bill of Rights of 1688. 1 William and Mary, sess. 2, c. 2, sec. 1; 9 Stat. L. 67. Anciently there can be no doubt that the king exercised the prerogative of impressment—that is, an arbitrary selection of individual free men, to serve in the army. Barrington, Observations on Ancient Statutes, p. 334; Stubbs, Constitutional History of England, vol. 2, pp. 284, 540. Falstaff, apologizing for the cadaverous individuals whom he had gathered under his commission of array, said: "I have misused the king's press damnably." King Henry IV, part 1, act 4, scene 2.

The barons at one time disputed the right of the Crown to compel foreign service under the feudal obli-

gation; but as to the extent of the obligation of knight service, Pollock and Maitland say: "It is a question, we may say, which never receives any legal answer." 1 History of English Law, 232. When the knights did not furnish a sufficient force Stubbs states "recourse was had to the native population. Every free man was sworn under the injunction of the Conqueror to join in the defense of the king, his lands and his honour, within England and without." 1 Stubbs, Constitutional History of England, Clarendon Press, 2d ed., p. 33; under Henry III (2 Stubbs, *supra*, p. 280).

Commissions of array were developed under Edward I.

> In 1282, on the 30th of July, he commissioned William le Butiller of Warrington to 'elect,' that is, to press or pick a thousand men in Lancashire. (Stubbs, vol. 2, p. 284.)

Edward II threw the expense of additional armies on the townships and counties.

> Edward I moreover had always paid the wages of his forced levies; under Edward II the counties and even the townships were called upon to pay them; they were required to provide arms not prescribed by the statute of Winchester, to pay the wages of the men outside of their own area, and even outside of the kingdom itself. (Stubbs, vol. 2, p. 540.)

A petition was presented to Edward III "that the 'gentz de commune' might not be distrained to arm themselves at their own cost contrary to the statute of Winchester, or to serve beyond the limits of their

counties except at the king's cost." 2 Stubbs, p. 542. The statutes which resulted from the petitions are gathered in an appendix (Appendix "E").

But though the statutes come to prohibit the Crown from impressing soldiers without "the common consent and grant made in Parliament," and provide at a later day (1661) that subjects of the realm shall not be compelled to march out of the kingdom otherwise than by the laws of England ought to be done, 13 Car II, c. 6, 5 Stat. R. 308; 13 and 14 Car II, c. 3, 5 Stat. R. 358 (1662), nothing has been found which limits the *power* of *Parliament* to compel foreign military service. The obligation of every "lovinge and obedient subject" "accordinge to their bounden dutyes" to serve and assist his prince and sovereign "within this Realme and without this Realme" was expressly recognized in 1494 by act 11 Henry VII, c. 18, 4 Stat. L. England, p. 66; and in 1503, 19 Henry VII, 4 Stat. L. England, p. 82; 3 Henry VIII, c. 5, 4 Stat. L. England 111 (A. D. 1511, 1512); 2 and 3 Edward VI, c. 2, A. D. 1548, 4 Stat. Realm 39; see 4 and 5 Philip and Mary, c. 3, 4 Stat. R. 320 (1557). In 1592 Parliament levied a tax on the parishes for the Relief of Souldiers, 35 Eliz. c IV, 4 Stat. Realm, pt. 2, p. 847. The act provided "That everie Souldier or Marriner * * * or such as shall hereafter return into this Realm hurte or maymed or grevouslie sicke, shall repaire * * * to the Treasourers of the Countie out of which he was pressed, or if he be no prest man. * * *" Parliament itself provided for impressment of vagrants to serve in the army in

1703, 2 and 3 Anne, c. 13, 8 Stat. R. 275; 4 Anne, c. 10, 8 Stat. R. 356 (1704); 4 and 5 Anne, c. 21, 8 Stat. R. 503 (1705); 7 Anne, c. 2, 9 Stat. R. 40 (1708); 29 George II, c. 4, 21 Stat. L. 318 (1756); 30 George II, c. 8, 22 Stat. L. 10 (1757); 18 George III, c. 53, 32 Stat. L. 117 (1778); 19 George III, c. 10, 32 Stat. L. 183 (1779). These latter statutes it is true applied only to a certain class of citizens. But if Parliament had power to draft one class, an increased military necessity would warrant the impressment of others. In 1640 Parliament enacted that the Justices of the Peace should "impresse * * * persons as shall be fit and necessary." 16 Car 1, c. 28, 5 Stat. Realm 138, Appendix "E," *infra*, p. 138.

Blackstone mentions among the rights of Englishmen the right not to be banished, making it clear, however, that military service in foreign parts is not within the term (vol. 1, pp. *137, 138). He said:

> The law is in this respect so benignly and liberally construed for the benefit of the subject that though *within* the realm the King may command the attendance and service of all his liegemen, yet he cannot send any man *out of* the realm even upon the public service; excepting sailors and soldiers, the nature of whose employment necessarily implies an exception. He cannot even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign ambassador. For this might in reality be no more than an honorable exile.

The power to impress seamen to serve in the Navy was thoroughly established. See *King* v. *Douglass*, 5 East 477 (1804); *Ex parte Fox*, 5 Term Rep. 276; *Barrows Case*, 14 East 346; *King* v. *Young*, 9 East 466; *Reg.* v. *Broadfoot*, Foster's Crown Cases (1809), p. 154. Barrington's Observations on Ancient Statutes, p. 334. In *Rex* v. *Tubbs*, 2 Cowp. 517 (1776), Lord Mansfield said that this power was based upon immemorial custom. See Cooley on Constitutional Limitations, 6th ed., p. 363.

II.

THE SELECTIVE DRAFT LAW INFRINGES NO PROVISION OF THE CONSTITUTION CONCERNING THE MILITIA.

The militia is mentioned in five provisions of the Constitution, as follows:

> Art. I, sec. 8. The Congress shall have power * * *
>
> (Cl.) 15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;
>
> (Cl.) 16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.
>
> Art. II, sec. 2. 1. The President shall be Commander in chief of the Army and Navy of

> the United States, and of the militia of the several States, when called into the actual service of the United States * * *.
>
> Amendment II. A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.
>
> Amendment V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger * * *.

Plaintiffs in error submit various and contradictory contentions based on the clauses quoted. Summarized, the argument runs as follows: Plaintiffs in error, although not in the organized, are members of the unorganized militia, therefore they may be called only as militiamen and for militia duty. Constitution, Art. I, sec. 8, cl. 15. If militiamen of the States may be placed in the National Army, rights reserved to the States to maintain the militia, appoint the officers, and train the local forces in accordance with the discipline prescribed by Congress, are infringed Amendment X; Art. I, sec. 8, cl. 16; briefs in Nos. 663–666, pp. 16, 18; brief in No. 656, pp. 30, 32; R. No. 680, p. 271; R. No. 681, pp. 7, 25; brief No. 702, p. 78.

Furthermore, they may be called as militiamen only for three purposes: To execute the laws of the United States, to suppress insurrections, and to repel inva-

sions. Specifically, they can not be sent out of the country. The Selective Draft Law calls the militia for purposes unauthorized by the Constitution. Briefs in Nos. 663–666, pp. 18, 19.

I. A citizen is not exempt from military service in the National Army merely because he is also a militiaman.

(a) The power granted to Congress over the militia of the States, Constitution, Art. I, sec. 8, cl. 15, 16, is not in limitation but in extension of the power to raise an army, cl. 12.

The clauses of Article I, section 8, of the Constitution constitute a charter of the powers conferred upon the National legislature. Each grant is distinct from and additional to the others. Congress may raise an army. It may also provide for calling forth the militia. There can be no ambiguity here.

The two powers are not inconsistent with each other, but are complementary. The army is a national organization whose business is war. The militia is a State institution, *infra*, p. 46, composed of the able-bodied citizenry, who devote practically their entire time to ordinary civilian pursuits. The Army is for use in a national crisis, trained and disciplined for service against hostile power until the war is concluded. The militia is to enforce the *posse comitatus*, primarily for use in time of local disturbance, and for a period of only a few months. Upon the State devolves the duty to maintain and train the militia. The State is expressly prohibited from establishing an army. Constitution, Art. I, sec. 10.

The complementary character of the two distinct powers is seen from the reasons for investing Congress with them. It was desired not to limit the power of the National Government over the army, but to make its existence subject to the control of the representatives of the people by restricting appropriations for only two years' use and to limit the occasions requiring the maintenance of an army in time of peace. Opposition from the descendants of Englishmen who had not forgotten the armies maintained by the Stuart kings in time of peace greeted the proposal to vest the National Government with power over "the bulwark of the citizen's liberties." 3 Elliot's Debates, 381; Farrand's Records of the Federal Convention, vol. 3, p. 207, 209. The answer was obvious that the Constitution did not provide for uncontrolled power of the Executive, and that there was no more ground to fear abuse of the power by representatives of the people in national assembly than in the local legislatures. Federalist, No. 25, p. 164. Given the power to call the militia of the States for local disturbances, the necessity for the maintenance by the National Government of a large standing army in time of peace is obviated. Supp. to Elliot's Debates, 466, 467. Given also the power to maintain armies, the National Government is not always under the necessity of calling upon citizens to leave their customary occupations, involving loss of time and labor and the expense incident to frequent rotation of militia service. Again, it was clear that untrained militia forces, though courageous, may in emergency not be sufficient

to cope with hostile disciplined troops. Federalist, Nos. 24, 25; Upton, "Military Policy of the United States," pp. 13, 15, 45, 101; see *McClaughry* v. *Deming*, 186 U. S. 49, 57.

The history of the times (*supra*, p. 24) reinforces the plain language of the Constitution that the insertion in that instrument of power to use the militia was not intended to abrogate the power to raise armies. The proportion of each organization and the means for raising both are for Congress to determine. See Federalist Nos. 22 to 29; *Burroughs* v. *Peyton*, 16 Gratt. 470, 482.

(b) The draft of a citizen into the armed forces of the United States infringes no reserved right of the States over the militia.

It is contended that the militia is an institution of the States; that if the Federal Government may make wholesale draft upon militiamen the State institution may be wiped out.

There is no doubt that the militia recognized in the Constitution is a State institution. This is shown not only by the reserved authority over it when not employed in the service of the United States (Art. I, sec. 8, cl. 16), but by the express language in Article II, section 2, clause 1, as follows:

> The President shall be Commander in chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States.

Prior to the adoption of the Constitution each of the States maintained its own militia. The States

have legislated concerning the militia establishment and organization since the beginning of the Government. It is thoroughly settled that such regulations, in the absence of congressional regulation to the contrary, are valid. *Presser* v. *Illinois*, 116 U. S. 252; *People ex rel.* v. *Hill*, 126 N. Y. 497, 503, 504; *Lanahan* v. *Birge*, 30 Conn. 438; *Dunne* v. *People*, 94 Ill. 120. In *Houston* v. *Moore*, 5 Wheat. 1, a conviction under a Pennsylvania statute of a militiaman who failed to respond at the point of rendezvous upon call into the service of the United States was held valid. Until he reported at the rendezvous the militiaman was regarded as in the control of the State (see pp. 21, 51). When the militia of the States is called out the militiamen as individuals are not directly addressed, but the call may be directed to the governor of the State or subordinate commanding officers of the militia (5 Wheat. 15; see act May 27, 1908, c. 204, 35 Stat. 399).

The argument from State sovereignty, however, goes too far. If its validity is admitted the grant of power to Congress "to raise armies" is practically nullified. It may be that an effective army can not be raised by voluntary enlistment. Power to make war and raise armies is a power to command, not to contract. If dependent on consent of individuals it is no power at all.

If the National Government can not draft citizens of the United States, who are also citizens and militiamen of the States, by the same token it is denied the power to accept volunteers who are State militia-

men. For if the entire State militia may be drafted, so also may the entire State militia voluntarily enlist. A private citizen can not, of course, grant away the sovereignty of the State. It may be said that the entire State militia would not voluntarily enlist. But if drafting part of the State militia is to be held invalid because later the whole may be drafted, by parity of reasoning voluntary enlistment of part is unconstitutional. *Ex parte Coupland*, 26 Tex. 386, 396; *Burroughs* v. *Peyton*, 16 Gratt. 470, 482. The ranks of the National Army must then be reduced to boys under 18, men over 45, and foreigners.

In the cases in the courts of the Confederate States during the Civil War which sustained the power of the Confederate Congress to conscript citizens of the Southern States, the point was insisted upon by members of the States' militia that the States' rights were being infringed. The contention was in each case denied. *Ex parte Coupland*, 26 Tex. 386, 396, 402; *Burroughs* v. *Peyton*, 16 Gratt. 470, 475, 483, 484, 485; *Jeffers* v. *Fair*, 33 Ga. 347, 351, 353; *Ex parte Tate*, 39 Ala. 254, 268; *Barber* v. *Irwin*, 34 Ga. 27, 37.

In *Simmons* v. *Miller*, 40 Miss. 19, 26, it was pointed out that if the national power over the citizens is subservient to the State's rights over militia, then the National Government is in the helpless condition of the Confederation, which it was one of the prime objects of the Constitution of the United States of 1787 to avoid.

In *Jeffers* v. *Fair*, 33 Ga. 347, the court, in disposing of the contention that to allow the National

Government to draft the militia interferes with the right of the States to appoint officers thereof, said (p. 353):

> The simple and obvious reply is that the status of the citizen is not merged in the militiaman; that the fact of enrolment with the militia does not exempt him from other duties and liabilities of citizenship.

In *Ex parte Bolling*, 39 Alabama 609, the Supreme Court of Alabama disposed of the contention as follows (p. 610):

> We have heretofore held, that the conscript laws are constitutional, (*Ex parte Hill*, 38 Ala. 428,) and we have also ruled, that when the lawful call of each government, Confederate and State, to perform military service, falls on the same person, the claim and call of the Confederate States must prevail over the claim and call of the State government, on the ground that the constitution of the Confederate States, and the laws made in pursuance thereof, are the supreme law of the land.

The same view of the contention was taken by the Supreme Court of Pennsylvania in a case arising under the Conscription Law of Congress of 1863, in *Kneedler* v. *Lane*, *supra*, 45 Pa. St. 238, 282, 322.

If there be conflict, therefore, between the State's rights over the militia and the national power to raise an army, the national power must prevail.

But there is no conflict in fact. Throughout our history the National Government has not impaired the right of the State to keep up its own militia.

Under the present Selective Draft Law only an inconsiderable portion of the militia of the States as a whole are drawn into the National forces. The citizens of the States are withdrawn from possible call for State militia service only temporarily, during the period of the existing emergency. Act of June 15, 1917, Pub. No. 23, 65th Cong., sec. 4, p. 41. The purpose of their withdrawal is in defense of all of the States.

The right of the States to organize and train the militia remaining has been recognized and safeguarded by the National Government. Act of June 14, 1917, Pub. No. 22, 65th Cong.; National Defense Act of June 3, 1916, 39 stat. 166, 198, sec. 61. The act of June 14, 1917, entitled "An act to authorize the issue to States and Territories and the District of Columbia of rifles and other property for the equipment of organizations of home guards," authorizes the Secretary of War during the existence of the emergency to issue to the several States

> for the equipment of such home guards of the character of State police or constabulary as may be organized by the several States and Territories and District of Columbia, and such other home guards as may be organized under the direction of the governors of the several States and Territories and the Commissioners of the District of Columbia or other State troops or militia * * * rifles [and other equipment as] shall be receipted for by the governors of the States and Territories * * * *Provided*, That all home

> guards, State troops and militia receiving arms and equipments, as herein provided, shall have the use, in the discretion of the Secretary of War, and under such regulations as he may prescribe, of rifle ranges owned or controlled by the United States of America.

The home guards or militia here referred to are of the character of local organizations mentioned in section 61 of the National Defense Act of June 3, 1916, which provides:

> That nothing contained in this Act shall be construed as limiting the rights of the States and Territories in the use of the National Guard within their respective borders in time of peace: *Provided further*, That nothing contained in this Act shall prevent the organization and maintenance of State police or constabulary.

Far from attempting to interfere with the right of the States to organize, train, and call citizens for local militia service, these acts expressly provide for aiding the States therein by lending rifles and other equipment.

Already statutes have been passed in many States providing for calling out members of the unorganized militia for State service when the members of the National Guard are in the forces of the United States.[1]

[1] Georgia, Laws 1916, pp. 158, 160, 161, secs. 2, 9, 10, 11.
Illinois, Laws 1917, act June 25, 1917, secs. 1, 2, pp. 782, 783.
Louisiana, Laws 1915–16, No. 264, secs. 5, 9, 70, pp. 540, 542, 548.
Maine, R. S. 1916, c. 15, secs. 9, 10, pp. 296, 298, 299.

2. Constitutional restrictions concerning militia service are not material in these cases because the duty enforced by the Draft Law is not that of militiamen but of citizens.

(a) Plaintiffs in error were drafted not as militiamen but as citizens of the United States.

The Selective Draft Law is entitled "An act to authorize the President to increase temporarily the Military Establishment of the United States." It provides in section 1 for, first, increasing the increments of the Regular Army; second, for drafting those persons then serving as members of the National Guard; and, third, for drafting an additional force of 500,000 enlisted men. The Regular Army is being recruited by voluntary enlistment. Plaintiffs in error do not claim to be members of the National Guard. Hence their objection must be to the third method of increasing the Military Establishment—the draft. The draft is not based upon the liability to perform militia duty. On the contrary, section 2 provides:

> Such draft as herein provided shall be based upon liability to military service of all

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Maryland, Laws 1917, act June 17, 1917, ex. sess., c. 26, sec. 91, p. 62.

New Hampshire, Pub. Acts and J. Res. 1917, c. 123, sec. 4, p. 52; c. 144, p. 64; c. 197, p. 98.

New York, Laws 1916, vol. 3, c. 568, p. 1862, sec. 9.

North Carolina, Pub. Laws 1917, c. 200, secs. 10, 47, pp. 352, 353,, 360-361.

Oregon, Gen. Laws 1917, c. 327, secs. 3, 4, 11, 13, pp. 655, 657.

Washington, Laws 1917, c. 107, sec. 1, 9, pp. 361, 364, 365.

> male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty-one and thirty years, both inclusive.

While the act calls for men only between the ages of 21 and 31, the militia of the various States comprises men between the ages of 18 and 45. National Defense Act of June 3, 1916, c. 134, 39 Stat. 166, 197, sec. 57. There are certain well-known methods of calling out the State militia into the service of the United States. In the statutes under which Congress has in the past made provision for calling the militia the words are addressed expressly to the militia.[1]

Counsel in cases Nos. 680, 681, 709, admit "that the law does not call the militia" (R. No. 681, p. 35; No. 680, p. 271). In the *Kramer* case counsel

[1] Congressional statutes authorizing the President to call out the militia of the States:

Act Sept. 29, 1789, c. 25, 1 Stat. 95, 96.
Act Apr. 30, 1790, c. 10, 1 Stat. 119, 121, sec. 16.
Act May 2, 1792, c. 28, 1 Stat. 264.
Act May 9, 1794, c. 27, 1 Stat. 367.
Act Nov. 29, 1794, c. 1, 1 Stat. 403.
Act Feb. 28, 1795, c. 36, 1 Stat. 424.
Act June 24, 1797, c. 4, 1 Stat. 522.
Act Mar. 3, 1803, c. 32, 2 Stat. 241.
Act Apr. 18, 1806, c. 32, 2 Stat. 383.
Act Mar. 30, 1808, c. 39, 2 Stat. 478, 479.
Act Apr. 10, 1812, c. 55, 2 Stat. 705, 706.
Act May 13, 1846, c. 16, 9 Stat. 9.
Act July 29, 1861, c. 25, 12 Stat. 281.
Act July 17, 1862, c. 201, 12 Stat. 597, sec. 1.
Act Jan. 21, 1903, c. 196, 32 Stat. 775, 776, sec. 4.
Act May 27, 1908, c. 204, 35 Stat. 399, 400, sec. 3.

stated in the court below "that the conscription law calls, therefore, for the men of the State into the service of the United States, but it does not call on the Governor to provide militia" (R. No. 680, p. 10).

It is argued that since section 57 of the National Defense Act of 1916 designates all able-bodied male citizens between the ages of 18 and 45 as militiamen the Selective Draft Law is a call upon militiamen for militia service. The section referred to provides:

> The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia.

In thus treating of the men liable to call for militia service Congress clearly did not intend to relinquish its power to call citizens for service in the National Army. As section 57 states, men between 18 and 45 are liable to militia duty. The Selective Draft Law provides that men between 21 and 30 are subject to military service in the National Army. Section 57 of the act of 1916 throws no light on the subsequent statute.

(b) Members of the National Guard are called not as militiamen but as citizens of the United States.

It may be urged that although the increase in the Regular Army recruits and the additional force of 500,000 drafted men provided by the Selective Draft Law are not called as militia, the National Guard was the Organized Militia of the States and was called out as such. This also is incorrect.

Section 1 of the act provides:

> That in view of the existing emergency, which demands the raising of troops in addition to those now available, the President be, and he is hereby, authorized—
>
> * * * * *
>
> Second. To draft into the military service of the United States, organize, and officer, in accordance with the provisions of section one hundred and eleven of said national defense Act, so far as the provisions of said section may be applicable and not inconsistent with the terms of this Act, any or all members of the National Guard and of the National Guard Reserves, and said members so drafted into the military service of the United States shall serve therein for the period of the existing emergency unless sooner discharged: *Provided*, That when so drafted the organizations or units of the National Guard shall, so far as practicable, retain the State designations of their respective organizations.

The authority is not to call into service militia organizations. It is to call any of the members of the militia. Authority extends to drafting any or all of

such members. "Said members so drafted * * * shall serve." Again, the members drafted are to be organized and officered. National Guard organizations are already organized and officered. Furthermore, the draft is specified to be in accordance with section 111 of the National Defense Act of 1916, which provides that "persons so drafted, shall from the date of their draft, stand discharged from the militia." This section reads as follows:

> When Congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, * * * draft into the military service of the United States, to serve therein for the period of the war unless sooner discharged, any or all members of the National Guard and of the National Guard Reserve. All persons so drafted shall, from the date of their draft, stand discharged from the militia, and shall from said date be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Volunteer Army, and shall be embodied in organizations corresponding as far as practicable to those of the Regular Army or shall be otherwise assigned as the President may direct.

Section 101 of the National Defense Act of 1916, 39 Stat. 208, on the other hand, makes express provision for calling the National Guard as State militia. This section provides:

> The National Guard when called *as such* into the service of the United States shall, from the time they are required by the terms of the call to respond thereto, be subject to the laws and regulations governing the Regular Army, so far as such laws and regulations are applicable to officers and enlisted men whose permanent retention in the military service, either on the active list or on the retired list, is not contemplated by existing law. (Italics ours.)

It is true that section 1, paragraph 2, of the Selective Draft Law, *supra*, contains a proviso which refers to organizations or units of the National Guard. The proviso, however, does not change the effect of the purview of the paragraph. The clause "when so drafted" refers to the preceding words "any or all members." It does not qualify the subsequent words "organizations or units of the National Guard." The law provides that when any or all members of the National Guard are drafted they shall be embodied into organizations, and any force of training cadres may be transferred to any other force (sec. 2). Section 2 further provides:

> Organizations of the forces herein provided for, except the Regular Army and the divisions authorized in the seventh paragraph of section one, shall, as far as the interests of the service permit, be composed of men who come, and of officers who are appointed from, the same State or locality.

The same injunction is contained in section 7:

> *Provided*, That all persons enlisted or drafted under any of the provisions of this Act shall so far as practicable be grouped into units by States and political subdivisions of the same.

The three provisos are *in pari materia*. Members of the National Guard may be drafted. When detached they are to be embodied into organizations of men from the same locality, being grouped together. The organization so made up according to section 1, paragraph 2, now under consideration, shall, "so far as practicable, retain the State designations of their respective organizations." This proviso patently deals with nomenclature. The organizations spoken of are not the old organizations of the National Guard but the new units embodying any or all National Guard members and others transferred. The qualifying clause "so far as practicable" indicates that this is the proper construction of the proviso.

In *United States* v. *Sugar*, 243 Fed. 423, the district court in disposing of a similar contention said (p. 439):

> If the federal government has, as there can be no doubt that it has, the power to draft into the military service of the United States any of its citizens, surely it has power to draft such citizens, notwithstanding the fact that they may previously have been members of the National Guard. Otherwise, it would be in the power of any state or of its citizens to easily evade or nullify any attempt of the

federal government to exercise this power and such power might be wholly nugatory.

As to the power to select from the body of the citizenship those who are members of the National Guard, there can be little doubt. Such a selection is not arbitrary. Having been trained to military service, it is both reasonable and prudent to choose them among the first in increasing the Military Establishment. In an able article in 30 Harv. Law Rev., 712, Maj. S. T. Ansell (now Brigadier General and Acting Judge Advocate General) states (p. 715):

> Throughout our history the States have recognized the feasibility of parting with their organized militia when a national crisis has demanded it. In the Civil War the States reported first with their active militia in raising their quotas for the Federal Army, and the State organizations with their members became, when mustered into the service, United States Volunteers. The same thing prevailed in the Confederacy during that period. In the War with Spain the Volunteer Army was raised in the same manner. Of course, in contemplation of law the militia has been taken not as militia, nor as militia organizations, but as individuals owing the National allegiance and service. Such a long-continued course of governmental conduct is not without significance.

The article concludes with the following adequate language (p. 723):

> A militiaman, organized or unorganized, is a citizen. Concededly an unorganized, or re-

> serve, militiaman is subject to draft; otherwise, since all arms-bearing citizens are such militia, whence shall our armies come? An organized militiaman is no less a citizen and is much better prepared, largely at Federal expense, to make an effectual contribution to the country's cause in time of war.

Of course, in a strict sense, none of the present plaintiffs in error is entitled to raise these objections. No one of them is affected by the constitutional point presented. None of the plaintiffs in error is a National Guardsman. Persons drafted in the army of 500,000 are not entitled to present the rights of National Guardsmen.[1] Even in the conspiracy cases, Nos. 680, 681, 702, the point is improperly raised, because the conspiracy charged was to violate those provisions of the draft law dealing with enrollment. The provision as to National Guard is separable. See *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19.

3. Assuming arguendo that plaintiffs in error are called as militiamen and are ordered abroad, they can not obtain relief in the courts.

We assume for the purpose of argument, wholly contrary to the facts, that the national authorities

[1] In case the question were properly raised by a National Guardsman, the further consideration may be presented that under the terms of his oath, secs. 70, 71, by which he agrees to obey the orders of the President, to serve under conditions prescribed by law, and to defend the United States against all enemies whomsoever, he has expressly waived his alleged right as militiaman to remain in the country.

have called out the Organized Militia of the States and that plaintiffs in error as members thereof have been ordered to respond. They assert that there is no need for a militia force to execute the laws of the Union, suppress insurrection or repel invasion, and that they can neither be sent abroad nor ordered out at all.

It has long been settled, however, under our scheme of constitutional government and the statutes, that the power resides in only one person to decide when the emergency arises which justifies the calling out of the militia: that person is the Commander-in-Chief, the President of the United States. *Martin* v. *Mott*, 12 Wheat. 19, 31, 32; *Luther* v. *Borden*, 7 How. 1, 44. It is not even for the governor of the State, much less a private militiaman, to say that the President has wrongly decided. We recognize the constitutional limits on the power of the President to call out the militia. Attorney General Wickersham advised President Taft in an opinion rendered February 17, 1912, that the militia can not be used as part of the Regular Army in a foreign land in time of peace. 29 Op. Atty. Gen. 322. The legal adviser of the Commander-in-Chief, however, was called upon to consider a different question from that which is presented to the court in these cases. The President, of course, should be scrupulously careful not to exceed the bounds of his constitutional authority. But the matter is solely within his discretion, and from a decision made in exercise thereof no appeal lies to the courts. Corres-

tion for possible abuse is in the power of impeachment and frequent elections.

On the facts in the present cases, moreover, it certainly could not be said that the Commander-in-Chief has exercised his discretion unwisely. A mass of evidence may have persuaded him that the German military authorities had well-matured plans to conquer the armies of our present Allies and then invade our shores in order to compel us to pay the expenses of their adventure of aggrandizement. Evidence to this effect is now not altogether lacking to the public.[1]

In Mr. Wickersham's opinion of February 17, 1912, *supra*, it was said (p. 324):

[1] This seems to have been the opinion of Ambassador Gerard. 55 Cong. Rec., p. 1162.

Admiral Von Goetz, of the German Navy, is reported by Admiral Dewey to have stated during the Spanish-American War as follows:

"About 15 years from now my country will start her great war. She will be in Paris about two months after the commencement of hostilities. Her move on Paris will be but a step to her real object—the crushing of England. * * * Some months after we finish our work in Europe we will take New York, and probably Washington, and hold them for some time. We will put your country in its place, with reference to Germany. We do not propose to take any of your territory (?), but we do intend to take a billion or so of your dollars from New York and other places. The Monroe doctrine will be taken charge of by us, as we will then have to put you in your place, and we will take charge of South America, as far as we wish to. * * * Don't forget this, and about 15 years from now remember it, and it will interest you." (Naval and Military Record, No. 33, Vol. LII, p. 578; see 55 Cong. Rec., 8178.)

> The term "to repel invasion" may be, in some respects, more elastic in its meaning. Thus, if the militia were called into the service of the General Government to repel an invasion, it would not be necessary to discontinue their use at the boundary line, but they might (within certain limits, at least) pursue and capture the invading force, even beyond that line, and just as the Regular Army might be used for that purpose.

The power to repel invasion includes the power to do so effectively. *Martin* v. *Mott*, 12 Wheat. 19, 29. If, in the easily admitted case, the militia may be sent a few miles beyond the boundary lines of the territory of the United States under this power, it may be sent a few thousand miles as the necessary and effective means of repelling a threatened invasion.

III.

THE SELECTIVE DRAFT LAW IMPOSES NEITHER SLAVERY NOR INVOLUNTARY SERVITUDE.

Soon after the law now in question was approved the Supreme Court of California held in *Claudius* v. *Davie*, 165 Pac. 689, that "the claim that the law imposed slavery or involuntary servitude is utterly without merit." This was in a memorandum opinion on an application for a writ of prohibition against a State officer to prevent enforcement of the law. All those courts which have since considered the question (*supra*, p. 34) have expressed the same justifiable impatience with the suggestion.

If the citizen owes a duty to render military service, the Thirteenth Amendment does not interfere with its enforcement. The amendment was the result, not as counsel in the *Arver* case, with some imagination, assert, of the opposition of the people to the draft, but of a desire to banish forever the well-known forms of chattel slavery and the involuntary servitude akin thereto. It was not intended to destroy those powers of government necessary to be exercised to secure citizens the blessings of liberty. The argument of counsel is that the Thirteenth Amendment, designed to make citizens free, should, by denying the power of effective opposition, be molded into an instrument to make them slaves of a foreign power.

No better language can be employed in explaining the relation of the amendment to exceptional duties owed to the State than that of this court in *Butler* v. *Perry*, 240 U. S. 328, holding that a State may compel labor upon the public roads. It was there said (pp. 332, 333):

> Utilizing the language of the Ordinance of 1787, the Thirteenth Amendment declares that neither slavery nor involuntary servitude shall exist. This amendment was adopted with reference to conditions existing since the foundation of our Government, and the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results. It introduced no novel doctrine with

> respect to services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers. *Slaughter House Cases*, 16 Wall. 36, 69, 71, 72; *Plessy* v. *Ferguson*, 163 U. S. 537, 542; *Robertson* v. *Baldwin*, 165 U. S. 275, 282; *Clyatt* v. *United States*, 197 U. S. 207; *Bailey* v. *Alabama*, 219 U. S. 219.

In *Robertson* v. *Baldwin*, 165 U. S. 275, the sections of the Revised Statutes providing that justices of the peace might arrest deserting seamen, compelling them in effect to labor in accordance with their shipping articles, were sustained against an attack that they violated the Thirteenth Amendment. This court said (p. 282):

> It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional; such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards.

In *Tucker* v. *Alexandroff*, 183 U. S. 424, in which the arrest of a deserting conscript in the Russian navy was held proper as in accordance with the Russian treaty of 1832, no question was raised that the Thirteenth Amendment was in any way violated.

In *Clyatt* v. *United States*, 197 U. S. 207, where peonage was held contrary to the Thirteenth Amendment, this court said (p. 216):

> We need not stop to consider any possible limits or exceptional cases, such as the service of a sailor, *Robertson* v. *Baldwin*, 165 U. S. 275, or the obligation of a child to its parents, or of an apprentice to his master, or the power of the legislature to make unlawful and punish criminally an abandonment by an employé of his post of labor in any extreme case.

The records abound with examples of compulsory public service. A public officer can not resign when he will. *Edwards* v. *United States*, 103 U. S. 471. One duly elected may be compelled to serve by mandamus. *People ex rel. German Insurance Co.* v. *Williams*, 145 Ill. 573. Failure in this regard is a criminal offense at common law. See cases cited in *People ex rel.* v. *Williams, supra*, p. 578. Employees in a public service business, by reason of the relation into which they have entered and the peculiar and overwhelming public interest in its continuance at certain times, may be required, for a reasonable period, to continue at their posts. *Wilson* v. *New*, 243 U. S. 332, 351. In the 15th century Englishmen were impressed to build a wall to keep out the sea. Barrington's Observations on Ancient Statutes, 396. South Carolina in 1778 required the inhabitants of the neighborhood to labor in clearing a river. South Carolina Statutes at Large, vol. 7, p. 524. From time immemorial citizens have been compelled

to serve on juries. *In re Appeal of Scranton*, 74 Ill. 161; *Bragg* v. *People*, 78 Ill. 328, 330. They may be required to join the *posse comitatus;* to go to the tax office. Children may be compelled to go to school. *State* v. *Bailey*, 157 Ind. 324. Witnesses may be forced to appear. United States Constitution, Sixth Amendment; *Israel* v. *State*, 8 Ind. 467. Attorneys must defend accused persons without compensation. *Vise* v. *County*, 19 Ill. 78; *Rowe* v. *Yuba County*, 17 Calif. 61. Reports involving labor, little and vast, may be required. Physicians in some States must report births. *Robinson* v. *Hamilton*, 60 Iowa 134; pawnbrokers make daily report of pledges. *Launder* v. *Chicago*, 111 Ill. 291. Railroads may be required to render monthly return of violations of 16-hour law; *Balto. & Ohio R. R. Co.* v. *Int. Com. Comm.*, 221 U. S. 612; and to make annual reports involving much detail and labor; *Kansas City Southern Ry. Co.* v. *United States*, 231 U. S. 423.

Counsel in the *Arver* case No. 663 (brief, 34) list eleven instances of peculiar service said not to be covered by the Thirteenth Amendment, and comment upon them. We do not attempt to cover the bounds of history, nor to enumerate all the exceptional cases sanctioned by immemorial usage, nor, being unable to forecast the extent of the public necessities in analogous cases in the future, do we try to embrace all instances of service which the citizen may be required to render his Government. The striking fact is that in many cases in which compulsory service has been regarded as exceptional, the analogy to

which reference is made as a fact universally admitted, is that of compulsory military service. A typical passage is *In re Dassler*, 35 Kans. 678, in which compulsory labor on the public roads was held not to contravene the Thirteenth Amendment. The court said (p. 684):

> Such labor has never been regarded or construed by any of the authorities as falling within the terms of the constitution prohibiting slavery and involuntary servitude. Militia service is also compulsory, and if the theory of the petitioner is correct, such service, when involuntary, is within the terms of §6 of the bill of rights, and the thirteenth amendment to the constitution of the United States. Such however is not the case, and we do not think that art. 8 of the constitution of this state conflicts in any way with §6 of the bill of rights or with the thirteenth amendment. There are certain services which may be commanded of every citizen by his government, and obedience enforced thereto; among these services are labor on the streets or highways, and training in the militia.

See also *Bragg* v. *People*, 78 Ill. 328, 330; *Hoke* v. *Henderson*, 4 Dev. (N. Car.) 1, 29; *State* v. *Wheeler*, 141 N. Car. 773, 777; *People ex rel. German Ins. Co.* v. *Williams*, 145 Ill. 573, 583.

An instructive precedent may be found in the legislation affecting the Northwest Territory, important under the reasoning of this court in *Butler* v. *Perry*, *supra*, p. 332. It seems the first appearance of the lan-

guage "neither slavery nor involuntary servitude" was in Jefferson's handwriting in 1784.[1] Jefferson was at that time on a committee of Congress to provide for the government of the Northwest Territory. The Writings of Jefferson, Ford's ed., vol. III, pp. 407, 410, 428, 429; Thorpe, Constitutional History of the United States, vol. I, p. 261. The language is adopted in the Northwest Ordinance of 1787, art. 6, 1 Stat. 53. Other sections of the Northwest Ordinance are as follows:

> The governor for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same, below the rank of general officers; all general officers shall be appointed and commissioned by Congress. (1 Stat. 51.)
>
> Art. II. * * * No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the

[1] Evidently the author did not believe that the language prohibited compulsory military service, for Jefferson presented a conscription bill to the Virginia legislature in 1777; and in his Annual Message to Congress on December 3, 1805, he recommended universal compulsory training. Jefferson's Works, Ford's edition, vol. 2, p. 123; vol. 8, pp. 384, 392. He explained his recommendation in a letter to General Kosciusko February 26, 1810. Jefferson's Works, Washington edition, vol. 5, pp. 506, 507:

"Two measures have not been adopted, which I pressed on Congress repeatedly at their meetings. The one * * * the other was to class the militia according to the years of their birth, and make all those from 20 to 25 liable to be trained and called into service at a moment's warning."

> land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. (1 Stat. 52.)

Very soon after the creation of the Northwest Territory laws requiring personal militia service were passed. Chapter 1 (published July 25, 1788) of the "Laws of the Territory Northwest of the River Ohio from the Commencement of the Government to the 31st of December, 1791," page 3 (Chase, Statutes of Ohio, vol. 1, p. 92), provides:

> § 1. All male inhabitants between the age of sixteen and fifty, shall be liable to and perform military duty, and be formed into corps in the following manner.

All male inhabitants were required to be armed and equipped, and to assemble on the first day of each week, and as the Commander-in-Chief might direct. Chapter 8 of the above laws, page 30 (Chase, Statutes of Ohio, vol. 1, p. 102), passed November 23, 1788, required the officers of the militia to enroll all persons obliged to do military duty. A further amendment of July 2, 1791, chapter 23, page 66 (Chase, Statutes of Ohio, vol. 1, p. 113), provided that the captains of each company should order an assembly on the last day of every week in the year to exercise his company for two hours. These laws were reenacted September 16, 1799 (Chase, Statutes of Ohio, vol. 1, c. 86, p. 211).

A comprehensive militia law, repealing the former statutes dealing with the militia, was enacted December 13, 1799. Ch. CV, Statutes of Northwest Territory, contained in vol. 1 of Chase's edition of Statutes of Ohio, p. 245. Section 1 of this statute provides:

> That each and every free, able bodied, white male citizen, of the territory, who is or shall be of the age of eighteen years, and under the age of forty-five years, except as is hereinafter excepted, shall severally and respectively be enrolled in the militia * * *.

Provision is made in the law for calling forth the militia by classes. Secs. 16, 33, 35, 36.

Compulsory military service thus was not regarded in the Northwest Territory as "involuntary servitude." The Northwest Ordinance itself, which uses the language of the Thirteenth Amendment, also provides for militia service and for other particular compulsory personal service when necessary "for the common preservation." It is just as clear now as it was in 1787 that both classes of service rendered in performance of duties to the State are not slavery nor akin thereto.

IV.

THE ACT IS NOT UNCONSTITUTIONAL ON THE GROUND THAT STATE OFFICIALS AID IN ITS ENFORCEMENT.

Counsel for plaintiffs in error in the *Arver, Grahl, O. Wangerin,* and *W. Wangerin* cases, Nos. 663, 664, 665, 666, present as their third point that the pro-

visions that State officials aid in the enforcement of the act are contrary to section IV of the Constitution and Article X of the amendments. Apparently the contention is (1) that the State loses its republican form of Government; and (2) its reserved rights under the Constitution are infringed. Briefs, pp. 40, 43, 48.) These points are not presented by plaintiffs' demurrer to the indictment, nor in the specifications of error in this court. Brief, p. 4.

The contention as to the guaranty of a republican form of Government is so wholly without merit as to justify no discussion. Moreover, the courts have no jurisdiction to consider it. *Luther* v. *Borden*, 7 How. 1; *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118.

As to the point that the State officials may not be required to aid in the enforcement of the law, plaintiffs in error are in no better position to raise the question. They are not State officials themselves nor is any State official here objecting. No statutory or constitutional provision of any State is cited as being infringed. If and when State officials appointed to carry out the Selective Draft Law do not voluntarily aid in the execution of the Federal law, questions as to the invasion of their rights and the State's sovereignty may properly be considered.

In executing the Federal law, however, State officials are *pro hac vice* Federal officials. It is settled that power may be conferred upon State officers as such to execute duties under an act of Congress in absence of contrary statutory or constitutional pro-

visions of the State. *Prigg* v. *Penna.*, 16 Pet. 539, 622; *Robertson* v. *Baldwin*, 165 U. S. 275; *Levin* v. *United States*, 128 Fed. 826. This principle was applied in *Dallemagne* v. *Moisan*, 197 U. S. 169, where an arrest of a sailor in accordance with treaty provisions by a State policeman was held valid.

During the Civil War the act of July 17, 1862, c. 201, 12 Stat. 597, calling out the militia was administered largely by State officials upon request of the President. It was held that Congress had power to authorize the State officers so to act, and that officers acted correctly in exercising the authority delegated. *In re Spangler*, 11 Mich. 298; *In re Griner*, 16 Wis. 423, 433; *Druecker* v. *Salomon*, 21 Wis. 621, 625; see *Allen* v. *Colby*, 47 N. H. 544.

In *Claudius* v. *Davie*, 169 Pac. 689, the Supreme Court of California refused to grant a writ of prohibition to prevent State officials from enforcing the draft law now in question.

As a matter of fact, it is highly consonant with the maintenance of local government in its full vigor, with the preservation of the rights of the State and of the individuals in different communities, that the law be understandingly administered by denizens of the respective communities, rather than by an extensive force of Federal officials.

V.

THE ACT DOES NOT DELEGATE LEGISLATIVE AUTHORITY TO ADMINISTRATIVE OFFICIALS.

This matter is discussed by counsel for plaintiffs in error in cases Nos. 663, 666, briefs, pp. 49 to 55. (Counsel in the *Ruthenberg* case, No. 656, also raise the point, brief, p. 31.)

The Selective Draft Law makes legislative provision for an army with which to prosecute the war. The general rules for increasing the military establishment are prescribed. As to the draft, the statutory provisions are as specific as is reasonably practicable. The rule is laid down of universal liability to military service for all male citizens between the ages of 21 and 30 years. (Sec. 2.) Men are to be called upon the principle of selective service, so that the entire resources of the Nation may be most effectively marshaled. Classes of exemptions are detailed in section 4 with this purpose in view. The President merely executes the legislative will. Large discretion in administration is of course absolutely essential. Such matters as the particular number of men required to meet shifting needs and the kinds of organizations into which they may most effectively be placed are administrative details peculiarly appropriate for the exercise of the discretion of the commander in chief, and particularly inappropriate for the inelastic decision of the deliberating legislative body.

The law is thoroughly well settled by the decisions of this court. At the last term, the section of the Reserve Bank Act authorizing the Federal Reserve Board "to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds" was sustained. *First National Bank* v. *Union Trust Co.*, 244 U. S. 416. This section is less specific as to the method of applying general rules than is the present law. The court, speaking through Mr. Chief Justice White, said (p. 427):

> * * * we think it necessary to do no more than say that a contention which was pressed in argument * * * that the authority given by the section to the Reserve Board was void because conferring legislative power on that board, is so plainly adversely disposed of by many previous adjudications as to cause it to be necessary only to refer to them. *Field* v. *Clark*, 143 U. S. 649; *Buttfield* v. *Stranahan*, 192 U. S. 470; *United States* v. *Grimaud*, 220 U. S. 506; *Monongahela Bridge Company* v. *United States*, 216 U. S. 177; *Intermountain Rate Cases*, 234 U. S. 476.

The act of July 17, 1862, c. 201, 12 Stat. 597, which authorized the President, in calling out the militia of the States, to provide the entire body of procedure in those States which had no statutory provisions on the subject, was enforced in *In re Griner*, 16 Wis. 423; *Druecker* v. *Salomon*, 21 Wis. 621,

625; *In re Spangler*, 11 Mich. 298; *Allen* v. *Colby*, 47 N. H. 544; see *McCall's Case*, 15 Fed. Cas. No. 8669, p. 1225.

Counsel in the *Minnesota* cases, Nos. 663, 664, 665, 666, are unfortunate in their citation of cases. They cite *United States* v. *Blasingame*, 116 Fed. 654, and *United States* v. *Keokuk Bridge Co.*, 45 Fed. 178 (brief, p. 51). The former was expressly overruled in *United States* v. *Grimaud*, *supra*, 220 U. S. 506, 515. The latter was decided before and is inconsistent with the decisions of this court in *Union Bridge Co.* v. *United States*, 204 U. S. 364, and *Monongahela Bridge Co.* v. *United States*, *supra*.

Throughout our history the common method of providing for increase in the land forces has been simply to vest authority in the President to raise the necessary troops. See the following statutes:

Act March 3, 1791, c. 28, 1 Stat. 222, sec. 8.
Act May 28, 1798, c. 47, 1 Stat. 558.
Act March 2, 1799, c. 31, 1 Stat. 725.
Act Feb. 24, 1807, c. 15, 2 Stat. 419.
Act March 3, 1807, c. 39, 2 Stat. 443.
Act Jan. 2, 1812, c. 11, 2 Stat. 670.
Act Feb. 6, 1812, c. 21, 2 Stat. 676.
Act April 8, 1812, c. 53, 2 Stat. 704.
Act July 1, 1812, c. 119, 2 Stat. 774.
Act Jan. 29, 1813, c. 16, 2 Stat. 794.
Act Feb. 25, 1813, c. 31, 2 Stat. 804.
Act July 26, 1813, c. 27, 3 Stat. 47.
Act Jan. 28, 1814, c. 9, 3 Stat. 96.
Act Feb. 24, 1814, c. 16, 3 Stat. 98.
Act Jan. 27, 1815, c. 25, 3 Stat. 193, sec. 3.
Act May 23, 1836, c. 80, 5 Stat. 32.

Act July 5, 1838, c. 162, 5 Stat. 256.
Act May 13, 1846, c. 16, 9 Stat. 9.
Act May 13, 1846, c. 17, 9 Stat. 11.
Act June 17, 1850, c. 20, 9 Stat. 438.
Act July 22, 1861, c. 9, 12 Stat. 268.
Act July 25, 1861, c. 17, 12 Stat. 274.
Act July 31, 1861, c. 34, 12 Stat. 285.
Act July 17, 1862, c. 201, 12 Stat. 597, sec. 3.
Act March 3, 1863, c. 75, 12 Stat. 731.
Act Feb. 24, 1864, c. 13, 13 Stat. 6, sec. 1.
Act July 4, 1864, c. 237, 13 Stat. 379.
Act April 22, 1898, c. 187, 30 Stat. 361, sec. 5.
Act May 11, 1898, c. 294, 30 Stat. 405.

VI.

THE ACT DOES NOT INFRINGE THE PROVISIONS OF THE CONSTITUTION CONCERNING THE JUDICIAL POWER. ARTICLE I, SECTION 8, CLAUSE 9; ARTICLE III, SECTIONS 1 AND 2.

Counsel in the *Ruthenberg* case argue that the act by authorizing the President to establish in his discretion local boards to determine the inclusion or discharge of individuals or classes of individuals from the selective draft usurps judicial power (No. 656, brief, p. 33).

The boards of exemption do not exercise judicial power. They determine conditions of fact necessary to be ascertained by the Executive in enforcing the law. The boards aid in carrying out the legislative requirements that those subject to the draft who under all the circumstances may best be spared and are best qualified should render military service. Their duties are administrative. Surely it will not

be urged that in order to select the recruits for our defense the Federal courts must first pass upon every claim for exemption while meantime the armies of the enemy progress.

If the boards of exemption usurp judicial power then the board of tea inspectors does likewise in passing upon the quality of tea fit for importation, *Buttfield* v. *Stranahan*, 192 U. S. 470, 497, to the contrary notwithstanding; then does also the Secretary of the Interior in determining who is an Indian within the terms of a land grant, in spite of *West* v. *Hitchcock*, 205 U. S. 80. The executive who determines whether an alien is fit physically to enter the United States does not invade the province of the Federal judiciary; *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 338–340; see *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730; nor do the boards of special inquiry in determining the claims for admission of aliens to our shores. In *Union Bridge Co.* v. *United States*, 204 U. S. 364, this court held that the Secretary of War does not exercise judicial powers in determining whether a bridge is an unreasonable obstruction to navigation (pp. 385, 387).

A contention similar to that now considered was raised in *Zakonaite* v. *Wolf*, 226 U. S. 272, with reference to the power of executive officials to determine the facts upon which a deportation order of an alien may be based. In a memorandum opinion this court disposed of the contention as follows (p. 275):

> The appellant raises some other constitutional objections, viz.: * * * that the

[immigration] act vests judicial powers in an executive branch of the Government * * *. These are without substance, and require no discussion.

VII.

THE DUE-PROCESS CLAUSE OF THE CONSTITUTION IS NOT VIOLATED.

Counsel in the *Minnesota* cases, Nos. 663–666, raise the point that the act deprives citizens of all liberty without due process of law "since it assumes to confer upon the President of the United States discretionary and arbitrary powers in the selection of citizens into the draft army" (briefs, pp. 55, 56). It is asserted that citizens may be selected "upon the whim of a State official" (briefs, p. 61). The due process point is raised in the *Jones* case, No. 738 (R. p. 15); in the *Kramer* case, No. 681 (R. p. 35); in the *Ruthenberg* case, No. 656 (brief, pp. 35–37).

There is no charge that the act requires an arbitrary selection of citizens. No complaint is made that the act has been arbitrarily or unfairly administered. The contention is that discretionary powers are granted to the President in its administration to so large an extent that he or his subordinates may act upon their mere caprice.

Nothing in the law justifies this assertion. Large discretionary powers in executing the law are granted and necessarily granted, but the act as a whole provides a fair and orderly method of selection for military service, and forbids the unjust and dictatorial caprice which counsel believe to be authorized.

From the point of view of due process of law, a proceeding is most surely authorized if it was a normal and customary method with the people of this country at the time the Constitution was adopted *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272.

It is true that the law provides for the restraint of the liberty of the citizen to a certain extent. Yet to protect most truly the liberties of people who live together in communities it is plain that some governmental organization and some exercise of governmental powers are necessary. The pioneer on the frontier may be subject to no master. There is no absolute freedom, however, in civilized societies. Our own history prior to the adoption of the Constitution, and the present experience of one of the Allies, vividly show, moreover, that the government which exercises least powers may be the instrument of tyranny in the hands of domestic disturbers, as well as the facile tool of foreign conquerors. The Federalist, speaking to the point in 1787, states (No. 26; pp. 170, 171):

> It was a thing hardly to be expected that in a popular revolution the minds of men should stop at that happy mean which marks the salutary boundary between power and privilege, and combines the energy of Government with the security of private rights.
> * * *
> The idea of restraining the Legislative authority, in the means of providing for the national defense, is one of those refinements,

> which owe their origin to a zeal for liberty more ardent than enlightened. * * * And I am much mistaken, if experience has not wrought a deep and solemn conviction in the public mind, that greater energy of Government is essential to the welfare and prosperity of the community.

Illustrations may be cited without number to show that in order to protect the liberties of the people as a whole the individual citizen may incidentally or temporarily be restrained of his liberties. It was in a case upholding the power of the State to compel vaccination that Mr. Justice Harlan said (*Jacobson* v. *Massachusetts*, 197 U. S. 11, 29):

> The liberty secured by the Fourteenth Amendment, this court has said, consists, in part, in the right of a person "to live and work where he will," *Allgeyer* v. *Louisiana*, 165 U. S. 578; and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense.

Yet military service, cited as the extreme example of restriction of personal liberty, is only temporary, incidental to the security of the citizens as a whole, and only so far imposed as is necessary for the purpose. The few who are compelled to serve do so that the many who remain at home at the present time, and the generations who come in the future, may

enjoy those blessings of freedom which this Government was established to secure.

VIII.

THE SELECTIVE DRAFT LAW NEITHER ESTABLISHES A RELIGION NOR PROHIBITS ITS FREE EXERCISE.

Counsel in the *Kramer* case, No. 681, and in the *Goldman* and *Berkman* case, No. 702, assign as error that the Selective Draft Law

> violates Article I of the Amendments of the United States Constitution which reads as follows: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." (R. No. 681, p. 34.)

The Selective Draft Law exempts from military service

> a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant. (Sec. 4.)

This provision has nothing in it "respecting an establishment of religion." The law recognizes the right of every citizen to choose religious affiliations without restriction. It goes so far as to aid

in the free exercise of those religions which forbid participation in war.

Under section 4 also may be exempted "those found to be physically or morally deficient" and those with dependents. It will not be argued that the law establishes a status of physical or moral deficiency, or of financial dependency; nor that freedom to change these conditions is prohibited.

IX.

OTHER CONSTITUTIONAL QUESTIONS UNDER THE ACT.

1. Counsel in case No. 702 contend that Article I, section 8, clause 12, of the Constitution is violated in that appropriations for the support of the army are made for more than two years (brief, p. 90). Probably counsel did not notice that the Selective Draft Law which is now in question makes no appropriation whatsoever.

2. Counsel in the same case assign as error a violation of Article IV, section 2, subdivision 1 (R. No. 702, p. 537). Their brief contains no discussion on this point.

3. They also suggest that the act denies citizens the equal protection of the laws (brief No. 702, p. 96).

The clause in the Fourteenth Amendment guaranteeing equal protection of the laws is addressed not to Congress but to the States. Amendment XIV; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 158, 159.

Granting, however, that Congress were restricted by a similar clause, each of the exemptions pro-

vided by the Selective Draft Law has reason behind it (sec. 4). The law proceeds upon the equitable principle that all citizens are subject to call as their particular services are demanded. Exemptions are provided from direct military service because service in other capacities aids more directly in the successful prosecution of the war.

Exemptions to greater or less extent have been contained in every compulsory military service law passed by the States of the United States (see Appendices "A," "B," "C," *infra*, pp. 123, 131, 133). It is interesting that Quakers and conscientious objectors were frequently exempted during the Revolutionary War:

Virginia, Act July 1775, c. 1, 9 Hening, St. L. pp. 9, 28, 34.

Virginia, Act October 1777, c. 1, 9 Hening, pp. 337, 345.

North Carolina, Laws April, 1778, c. 1, sec. 13, vol. 24, State Records 190, 193.

New Hampshire, Metcalf's ed., vol. 4, pp. 273, 274, Act March 18, 1780, c. 12.

Rhode Island, Laws, February, 1777, pp. 8, 17.

Rhode Island, Laws, October, 1779, pp. 29, 38.

New York, Act April 1, 1777, c. 28, Laws N. Y., vol. 1, 1777 to 1784, pp. 51, 54.

New York, Act April 3, 1778, c. 33, Laws *supra*, pp. 62, 70–71.

New York, Act March 11, 1780, c. 55, Laws *supra*, p. 237, 245.

New York, Act April 4, 1782, 5th sess., c. 27, Laws 440, 449.

Massachusetts, Resolves June 12, 1778, c. 51 p. 13.

Massachusetts, Laws 1781, c. 21, p. 33.

Massachusetts, Act. Mar. 10, 1785, Perpetual Laws of Mass. 1780–1789, pp. 338, 347, secs. 42, 43.

On the other hand, the usual exemption to Quakers was not extended in Pennsylvania. See Act of March 20, 1780, c. 92, vol. 10, Stat. L., pp. 144, 146.

If the argument against this law upon constitutional grounds be not frivolous, then that adjective has lost its legal significance.

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PART TWO.

OTHER ERRORS ASSIGNED.

No. 656.

Charles Ruthenberg, Alfred Wagenknecht, and Charles Baker, plaintiffs in error, v. The United States.

STATEMENT.

Defendants Ruthenberg, Wagenknecht, and Baker were indicted with one Schue for violation of section 5 of the Selective Draft Law—Schue's wilful failure to register. Schue pleaded guilty (R. 65, 66). The charge against Ruthenberg, Wagenknecht, and Baker was that they aided, abetted, counseled, commanded, and induced Schue to violate the law (R. 1, 2), sec. 332, Criminal Code, 35 Stat. 1088, 1152, act of March 4, 1909, c. 321, sec. 332.

The facts are in small compass. Schue's testimony was as follows: He was of draft age (R. 50), and would certainly have registered if he had not heard about the Socialist peace meetings and listened to Baker speak at the meeting of May 20, 1917, in the public square in Cleveland, and to the speeches of Wagenknecht and Ruthenberg at the meeting of May 27 (R. 51, 56, 57). Baker announced that all socialists would refuse to register with the full support of the socialist party; that he would rather be shot here as a man than be shot in the trenches of Europe as a dog (R. 51, 52).

At the meeting of May 27, Max Hays, the first speaker, advised compliance with the law (R. 52). Wagenknecht, who followed, said that Hays's attitude did not comply with the standpoint of the socialist party (R. 78, 92). Wagenknecht continued "you can either obey or disobey the law. You can either disobey the law and go to jail or obey it and eat gravel and dust the rest of your life" (R. 53). "We will fight and fight and fight [conscription] until there is no more fight left in us (R. 54).

The stenographic report of Wagenknecht's speeches includes the following (R. 80):

> Well, the question is, of course,—you may applaud here this afternoon—but after a bit the question will be this: how many of you will have moral courage enough to refuse to register on June 5th? That's the question. That's the question, friends. The conscription law and its success, understand—the conscription law and its success depends in a measure upon the fact that thousands upon thousands will refuse to register * * *.

Soon after this the speech was interrupted by Wagenknecht's arrest. Ruthenberg then took up the challenge. He said that "if he was of military age and if he was asked to go he would rather have his body riddled with bullets than to submit to this here registration" (R. 55, 56).

Schue's evidence as to the speeches of Baker, Hays, Wagenknecht and Ruthenberg was corroborated by Lind (R. 66, 69), Stucky (R. 70, 71), and Farasey, a court stenographer, who took down the

speeches of Hays, Wagenknecht and Ruthenberg (R. 78–96). The Government's case in its main aspects was corroborated by defendants' witnesses (Bronstrup, R. 102; Fromholtz, R.110, 112; Wagenknecht, R. 127, 132; Ruthenberg, R. 149).

The theory of the defense was explained by Ruthenberg (R. 157):

> I will gladly explain, for the purpose of the court and jury, that I further stated, that rather than be conscripted, rather than be compelled to fight in this war, I would be stood against a wall and riddled with bullets. I might register and still not submit when I was conscripted. That was my position.
>
> (R. 158) You will remember that I did not say to them that they should refuse to register but said that they should refuse to be conscripted, which carried with it the fact that they might well submit to registration, but later they might claim exemption, they might raise all of the objection, and if they were still selected to fight in the army and they had these conscientious objections, which I stated I had, they could then refuse to do this work for the Government.
>
> Q. That is all you ever had in mind?
>
> A. That is my position.
>
> The Court: And did not your statement also carry with it that they might refuse to register?
>
> The Witness: Not necessarily.

The charge of the court was fair, and, if anything, favorable to the defendants. No exceptions

thereto were taken (R. 166, 171). The jury returned a verdict of guilty (R. 171). Now on writ of error we are asked to consider technical questions.

Counsel for plaintiffs in error make 59 assignments of error, which cover 23 pages of the printed record (R. 185–207). This is a violation of rule 35. *Badders* v. *United States*, 240 U. S. 391, 394. In their brief all are abandoned except those embraced in 10 specifications of error. We treat them in order of presentation in defendants' brief.

I.

BOTH GRAND AND PETIT JURIES WERE REGULARLY IMPANELED.

Specifications 1–6 concern rulings on the challenge to the array of the grand and petit juries.

1. The first (brief, p. 4) is that the trial court erred in not sustaining the challenge to the arrays on the ground that defendants were members of the Socialist Party and were without representation on the jury board. Section 276 of the Judicial Code, act of March 3, 1911, c. 231, 36 Stat. 1087, 1164, amended by act of February 3, 1917, c. 27, 39 Stat. 873, requires the names of grand and petit jurors to be placed in the jury box by the clerk of the court and the jury commissioner,

> * * * which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known

> member of the principal political party in the district in which the court is held opposing that to which the clerk * * * may belong * * *.

It was proved that the jury commissioner was a well-known member of the principal political party in the district opposing that to which the clerk belonged (R. 30).

It is suggested, however, that section 276 is unconstitutional, in not providing for a jury commissioner of the socialist party. The Constitution guarantees the right of "an impartial jury." It leaves to Congress discretion as to the details in securing such impartiality. It would obviously be impracticable to require the presence upon the jury commission of members of all political parties which may spring up.

It is not argued that the political preference of the jury commissioner and of the clerk tended to secure a jury that was not wholly impartial.

2. The second specification of error, that the names in the jury box and those drawn for jury service were exclusively the names of adherents of the Republican and Democratic parties (brief, p. 5), is passed over with little argument (brief, p. 13). The specification asserts violation (*a*) of section 276 of the Judicial Code and (*b*) of constitutional rights (brief, p. 5) (R. 38, 185).

Section 276 is satisfied. It provides that the names of the jurors are to be placed in the jury box by the clerk of the court and the jury commissioner,

> the clerk * * * and said commissioner each to place one name in said box alternately, without reference to party affiliations. * * * (39 Stat. 874.)

This was done. The record discloses that the clerk proceeded without reference to party affiliations of any of the persons that he selected (R. 31). He did not know that there were any names of Republicans or Democrats or Socialists put in either by himself, the jury commissioner, or the latter's predecessor (R. 31). The drawing was publicly made (R. 37), sec. 276, Judicial Code.

There is certainly no legal presumption of bias because the jury lists happen to be made up of Republicans and Democrats. This was not a political election, nor a debate upon the respective merits of political parties. It was a trial for inducing a susceptible young man not to register. In the stronger case, a jury which tries a negro is not disqualified because a negro is not a member thereof. *Martin* v. *Texas*, 200 U. S. 316, 320–321; *Thomas* v. *Texas*, 212 U. S. 278, 282.

The case of *Connors* v. *United States*, 158 U. S. 408, forecloses the defendants on this point. That was a trial for interfering with elections. Among many questions with reference to the politics of the jurors

submitted to them on their *voir dire*, to which the court refused to permit answer, was this (p. 412):

> Would your political affiliations or party predilections tend to bias your judgment in this case either for or against this defendant?

This court held that it would not disturb the ruling of the lower court, saying (p. 414):

> In the absence of any statement tending to show that there was some special reason or ground for putting that question to particular jurors called into the jury box for examination, it can not be said that the court erred in disallowing it * * *. (415) But no such exceptional circumstances are disclosed by the record, and the court might well have deemed the question—unaccompanied by any statement showing a necessity for propounding it—as an idle one that had no material bearing upon the inquiry as to the qualifications of the juror, and as designed only to create the impression that the interests of the political party to which the accused belonged were involved in the trial. * * * If an inquiry of a juror as to his political opinions and associations could ever be appropriate in any case arising under the statute in question, it could only be when it is made otherwise to appear that the particular juror has himself by his conduct or declarations given reason to believe that he will regard the case as one involving the interests of political parties rather than the enforcement of a law designed for the protection of the public against frauds in elections.

In *United States* v. *Eagan*, 30 Fed. 608, in sustaining a demurrer to a plea in abatement, Mr. Justice Brewer said (p. 609):

> * * * Neither party affiliation nor religious beliefs nor church adhesion affect the qualifications of a juror, grand or petit. * * *

In the same case Judge Thayer said (p. 612):

> * * * The fact that a man is a member of any political party is not a disqualification for jury service in any case, and practically that is all that is stated in the plea by way of disqualification of the five jurors in question. * * *

3. Specification 3 (brief, p. 7) is to the effect that the jury was incompetent because they were property owners and capitalists, hence biased. Of course ownership of property is not a disqualification. The jurors had not the most remote pecuniary interest in the outcome of the trial.

4. Specification 4 (brief, p. 7) is that the fourth ground of challenge should have been sustained, to wit: "That said juries have been selected and drawn exclusively from the eastern division of the northern district of Ohio, instead of from the entire district, contrary to the Sixth Amendment of the Constitution of the United States" (R. 9).

The statutes were complied with. The Judicial Code does not contemplate that jurors shall be returned from every corner of the district. Section 277 (36 Stat. 1164) provides:

> Jurors shall be returned from such parts of the district, from time to time, as the court

> shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service.

The court in this case directed that the jurors be taken from the eastern division (R. 36). Probably in the trials in the western division of the district, citizens for jury service are selected from that division so as to comply with the statutory provision that no unnecessary expense be incurred, and the citizens be not unduly burdened. Mr. Miller, clerk of the court, testifying, said (R. 31):

> These jurors whose names have been selected are from the Eastern Division and every county in the Eastern Division. I cannot tell you whether every county is represented in the jury box, because a number of names have been drawn out. * * *

The contention is that section 277 is unconstitutional (brief, p. 15). The answer may be found in a mere reading of the sixth amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, * * *.

The Constitution therefore guarantees the right to a jury of the State and district. The jurymen here challenged were unquestionably citizens of Ohio, and resident in the northern district thereof. What more is required?

The constitutionality of section 277 is settled. It represents the law since 1789, having been brought forward from section 802 of the Revised Statutes, and from a clause of section 29 of the Judiciary Act of September 24, 1789. (1 Stat. 72, 88, c. 20.) It was enforced in *Agnew* v. *United States*, 165 U. S. 36, 43, 44. See *Rosencrans* v. *United States*, 165 U. S. 257; *United States* v. *Wan Lee*, 44 Fed. 707; *United States* v. *Ayres*, 46 Fed. 651. In the latter case Judge Shiras said (p. 651):

> It cannot be possible that in framing the sixth amendment congress intended thereby to secure a constitutional enactment requiring juries to be summoned from an entire state or district, and at the same time, by the provisions of the judiciary act, declared that the courts should have the power to direct the juries to be summoned from parts only of the district.

In *United States* v. *Peuschel*, 116 Fed. 642, the court said concerning R. S. 802 (p. 646):

> This statute is almost as old as the government, having been a part of the judiciary act of 1789; and, the courts having acted upon it uninterruptedly for more than a hundred years, its constitutionality cannot now be successfully challenged.
>
> The plain and incurable vice of defendants' argument is its assumption that a defendant is entitled to a jury summoned from every part of the district. * * * The only constitutional right of the defendant is to a jury of which every member is a resident of a county

> or locality which, at the time the offense is alleged to have been committed, was a part of the district.

In *Clement* v. *United States*, 149 Fed. 305 (C. C. A. 8th C.; certiorari denied, 206 U. S. 562), the authorities are reviewed. In *Spencer* v. *United States*, 169 Fed. 562, R. S. sec. 802 was sustained, the court saying (pp. 565–6):

> The large number of counties which compose most judicial districts render it physically impossible to secure one grand juror, and very difficult to secure one petit juror, from each county of each district; hence, in the ordinary administration of the law governing the selection of jurors (section 800 et seq., Rev. St.), it would be impossible to secure a jury composed of one or more members from each county of a district. But in addition to this suggestion of convenience, it is apparent that one of the main purposes of the constitutional provision was to secure a trial by an impartial jury. The details of working out this main purpose were necessarily left to Congress.

See in accord *United States* v. *Merchants, etc. Trans. Co.*, 187 Fed. 355, 359, 362.

5. What we have said under the preceding point disposes of the fifth specification of error, which complains that certain counties were not represented among the names drawn for grand and petit jury service (brief, pp. 8, 9). In the eastern division of the Northern District of Ohio alone there are nineteen counties. Sec. 100, Judicial Code, 36 Stat. 1087,

1121. Every county, therefore, could not possibly be represented on the petit jury.

The record discloses moreover that the clerk placed in the box from which the drawings were made, names from all the counties of the district (R. 37).

6. Specification 6 (brief, pp. 9, 10) is as follows:

> The trial court erred in not sustaining the challenge upon the disclosure that the lists of names for jury service had been improperly selected.

The sole ground of impropriety urged is that (brief, p. 17):

> The trial court overruled the challenge, although the evidence disclosed that the clerk in getting names for jury service, instead of making the selection himself, left the selection to common pleas judges within the division.

This is not the subject of any assignment of error in the record. Assignments of error 17 and 18 (R. 190, 191) are based on the same proceedings (brief, p. 10). But the ground of error of assignment 17 is not that the clerk abdicated in performing his functions of jury selection, but as follows (R. 190):

> The trial court erred in refusing defendants to show that the names of the grand and petit jurors were chosen from the names of partisans of the Republican and Democratic parties, as is evident from the following testimony:

This is quite a different matter and has already been dealt with (*supra*, p. 90).

Assignment 18 is also a different matter:

> The court erred in refusing to permit B. C. Miller to answer in what manner the list of names sent in by Common Pleas Judges, as testified to by him, were selected, as is evident from the following testimony:
>
> Q. Do you know in what manner the list of names that were sent to you from the Common Pleas Judges as you have described, have been selected?
>
> A. Not in detail. Most of the Judges——
>
> Mr. Wertz: I object to that question; it would be hearsay.
>
> The Court: I sustain the objection to that question.
>
> Mr. Sharts: Enter an exception.

The point argued in defendants' brief "IV. Jury lists improperly selected" (p. 17) not being referred to in any assignment of error, violates rule 35 of this court, and need not be further considered. No objection was taken in the court below to the juries on the ground that the names of possible jurors were not selected by the clerk and the jury commissioner. It is not made a ground of the challenge to the arrays (R. 3); nor of the motion to quash (R. 12); nor of the plea in abatement (R. 14). Any objection on that score is therefore waived.

There is nothing of merit in the argument in any event. Section 276 requires the clerk and the jury commissioner to place the names of not less than 300 persons possessing the qualifications of jurors of the

highest court of the State (sec. 275) in the jury box. This was done. The performance of this duty was not delegated.

The Code does not prescribe the manner in which the clerk and the jury commissioner shall obtain information as to suitable names. When they placed the names in the box, regardless of where they may have been obtained, they exercised judgment that the persons named were proper jurors. In order to comply with section 275 the clerk naturally turned to those whose qualifications as State jurors were known (R. 31, 32). He put names in the jury box of men that he knew personally and of others that were suggested to him (R. 32).

This matter, again, is not of substance. No prejudice to the defendants is shown or hinted at. It is not alleged that the jurors selected were not properly qualified. Since the point is raised for the first time upon writ of error, section 1025, R. S., is of especial force.

II.

THE INDICTMENT WAS REGULARLY FOUND AND WAS SUFFICIENT IN FORM.

1. The motion to quash was properly denied.

We pass to the alleged error in refusing to quash the indictment specification 7. Seven grounds are relied upon (brief, p. 11).

A motion to quash is an appeal to the discretion of the trial court. *Durland* v. *United States*, 161 U. S. 306, 314; *Holt* v. *United States*, 218 U. S. 245. It is a

preliminary motion refused except in the clearest cases. *United States* v. *Rosenburgh*, 7 Wall. 580, 583.

The various grounds of the motion to quash in this case are not calculated to appeal favorably to those charged with the administration of justice.

1. The first ground is (brief, p. 11):

> The grand jury presented the indictment without these defendants having been charged with the offense upon oath or affirmation, and without any proper testimony having been presented to said grand jury or any witnesses sworn in a particular case.

So far as this is made one of the grounds of the plea in abatement (brief, pp. 11, 12), the plea is here considered.

If it is meant that the grand jury were not sworn, the contrary appears. The indictment states (R. 1):

> The grand jurors * * * empaneled and sworn * * * upon their oath present * * *.

And this is sufficient showing that the oath was properly taken. *Powers* v. *United States*, 223 U. S. 303, 312.

If it is meant that no sworn charge was presented to the grand jury (apparently so, see assignment 22 R. 192), this is not necessary. *Frisbie* v. *United States*, 157 U. S. 160, 163. In *Hale* v. *Henkel*, 201 U. S. 43, 59, 60, it was held that the grand jury may proceed without the formality of a written charge.

As to the evidence and the witnesses before the grand jury, the pleadings tendered are not sufficient.

It is not alleged that there was no evidence and that no witnesses were sworn. It is averred merely that there were no testimony and witnesses "in a particular case." If it had been intended to allege that no evidence and no sworn witnesses whatsoever were presented, the words "in a particular case" would not have been added.

But the grand jury may investigate generally. Particularity is usually the end, not the beginning of their proceedings. *Hendricks* v. *United States*, 223 U. S. 178, 184. In the present case, the grand jury was a special body, investigating violations of the Draft Act (R. 17).

It may be urged that counsel intended to allege that the witnesses were not sworn in a particular case, and that no proper testimony was presented to the grand jury at all. If a comma had been placed after the words "without any proper testimony having been presented to said grand jury," strength might be lent to such contention. But although the comma appears in the proffered plea (R. 17, 195, Brief, p. 12), counsel evidently regard it as immaterial, for it is omitted in the motion to quash, where precisely the same phraseology is used (R. 13, Brief, p. 11), and in the amended assignments of error (R. 192).

"Strict exactness" is required in dilatory pleadings of this sort. *Agnew* v. *United States*, 165 U. S. 36, 44. The allegations must be taken most strongly against the pleader.

Assume, for the sake of argument, that the motion and plea state that the grand jury presented the indictment "without any proper testimony having been presented" at all. It is not said that no testimony was presented. That this was not intended is clear from the plea, which states "without any testimony having been presented to said grand jury of a nature proper for such grand jury to receive" (R. 17). Wherein does the impropriety of the testimony consist? Was the evidence competent, but improperly obtained? See *Hillman* v. *United States*, 192 Fed. 264; certiorari denied, 225 U. S. 699. Was it competent, but weak? See *Holt* v. *United States*, 218 U. S. 245. The facts from which impropriety might be concluded are not revealed. No offer was made to prove the facts. Indeed, the validity of the ground alleged is stated in the motion to quash to be "apparent upon the face of the record" (R. 12), and nothing new is alleged to have been discovered when the plea in abatement was offered on the same day (R. 45).

The pleadings assert a pure conclusion of law. Some showing of facts at least is required before the presumption of the regularity of grand jury proceedings is overcome. We need not recur therefore to the cases showing the abuses which would result from reexamination of the sufficiency of the evidence before the grand jury, and enforcing the general rule that such review can not be made. *Cobban* v. *United States*, 127 Fed. 713, 718, 721; *Radford* v. *United States*, 129 Fed. 49, 51; *McGregor* v. *United*

States, 134 Fed. 187, 192, 193; *McKinney* v. *United States*, 199 Fed. 25; *Hillman* v. *United States, supra; United States* v. *Thomas*, 145 Fed. 74, 75; *In re Kittle*, 180 Fed. 946, 947; especially where the plea is sworn to only on belief (R. 17). See *United States* v. *Nevin*, 199 Fed. 831, 836. A case similar to the one at bar is *Holt* v. *United States*, 218 U. S. 245, 247, 248.

State v. *Dailey*, 72 W. Va. 520, is squarely in point. In that case a writ of prohibition was granted against a trial judge to prevent the filing of a plea in abatement that the grand jury acted upon wholly illegal evidence. Many cases in the State courts are cited in the opinion.

2. The second ground of the motion to quash now relied on (brief, pp. 11, 19) is:

> The failure of the indictment to state that Schue was a citizen or a male person not an alien enemy who had declared his intention to become a citizen.

Section 5 of the Selective Draft Law makes no exception such as here suggested. It requires "all male persons between the ages of 21 and 30, both inclusive, to be registered except officers and enlisted men of the Regular Army, Navy, and National Guard and Naval Militia while in the service of the United States." Schue was not one of the excepted classes (R. 61). If he had been, the indictment need not anticipate affirmative defenses.

Section 2, exempting alien enemies from the draft does not narrow section 5. An alien enemy is required to be enrolled, but not drafted.

3. The third ground of the motion to quash is that the indictment fails to state that the President's proclamation had been published prior to the commission of the offense. As we read the indictment, it states that Schue, on June 5, 1917, "was then and there required, by the Proclamation of the President of the United States dated May 18, 1917 * * *"; that he refused to register "as in said Act provided and in said Proclamation appointed" (R. 2).

4. The fourth ground is not pressed in the argument.

5. The fifth is that the indictment "alleges three separate offenses in one count" (brief, pp. 11, 21).

Only one offense is charged, the failure of Schue to register. The acts of Ruthenberg, Wagenknecht, and Baker in inducing, aiding, counseling, commanding Schue, do not constitute a separate crime. They are all principals in the commission of the one violation of law. Sec. 332, Criminal Code; *Connors* v. *United States*, 158 U. S. 408, 410, 411.

6. The next ground of the motion to quash is the alleged failure of the indictment to set forth the nature and cause of the accusation (brief, pp. 11, 22).

Defendants were fully advised by the indictment of the crime with which they were charged. They do not hint at surprise or difficulty in the preparation of their defense. They knew the speeches that

caused their arrests. Since they were not prejudiced in any way, the conviction must stand (R. S., sec. 1025). If they had desired more particularity they should have requested a bill of particulars. *Lamar* v. *United States*, 241 U. S. 103, 116, 117; *Bartell* v. *United States*, 227 U. S. 427, 432.

7. The last ground of the motion to quash is that the indictment charges defendants as accessories to a statutory misdemeanor (brief, pp. 11, 25).

It is not easy to catch the meaning of this specification. Defendants were indicted for procuring the commission of a violation of section 5 of the Selective Draft Law. They are not accessories, but principals in the commission of that crime. Sec. 332, Criminal Code.

2. The court correctly refused to allow the proffered plea in abatement to be filed.

The eighth specification of error refers to the refusal of the court in this regard (brief, p. 11).

The merits of the plea, which simply reiterated the grounds of the motion to quash, have already been considered, *supra*, pp. 99–105.

The plea, moreover, came too late. In *Agnew* v. *United States*, 165 U. S. 36, the indictment was returned December 12, plaintiff in error was arraigned December 17, and filed a plea in abatement on that day, alleging impropriety in the selection of the grand jury. This court held that the plea was properly refused, stating (p. 44):

> * * * certain rules may be regarded as generally applicable. One of these rules is

> that the defendant must take the first opportunity in his power to make the objection. * * * Another general rule is that for such irregularities as do not prejudice the defendant, he has no cause of complaint, and can take no exception.
>
> (p. 45) * * * The plea does not allege want of knowledge of threatened prosecution on the part of the defendant, nor want of opportunity to present his objection earlier, nor assign any ground why exception was not taken or objection made before * * *.

In *Hyde* v. *United States*, 225 U. S. 347, this court said (p. 373):

> It is said in the *Agnew Case* that pleas in abatement on account of irregularities in selecting and impaneling a grand jury which did not relate to the competency of individual jurors must be pleaded with strict exactness and that a defendant must take the first opportunity in his power to make the objection. The indictment in that case was returned December 12, 1895; the plea in abatement was filed on the 17th of that month. It was held to have been filed too late.

In the present case the drawings of the grand and petit juries, respectively, were made pursuant to orders of the court, on June 16, 1917, and July 3, 1917 (R. 37, 38). The indictment was returned June 27 (R. 2). The challenge to the array of the grand jury and petit jury was filed on July 14 (R. 3). On July 17, the Government entered a general denial to the challenge (R. 11). The motion to quash and the plea in

abatement were not presented until July 18, or about three weeks after the indictment was returned (R. 45). No excuse for the delay is offered in either pleading.

3. There was no error in overruling the demurrer to the indictment.

The grounds of the demurrer have already been examined. (Specification of error 9.) (Brief, p. 12.)

III.

THE COURT PROPERLY RULED OUT THE QUESTIONS PROPOUNDED TO THE PETIT JURORS ON THEIR VOIR DIRE AS TO WHETHER THEY DISTINGUISHED BETWEEN ANARCHISTS AND SOCIALISTS.

This is the subject matter of the last specification, 10 (brief, p. 12, 37).

In *Holt* v. *United States*, 218 U. S. 245, 248, this court said:

> The finding of the trial court upon the strength of the juryman's opinions and his partiality or impartiality ought not to be set aside by a reviewing court unless the error is manifest, which it is far from being in this case. See *Reynolds* v. *United States*, 98 U. S. 145. *Hopt* v. *Utah*, 120 U. S. 430. *Spies* v. *Illinois*, 123 U. S. 131.

In the present case the discretion of the lower court was not abused. How the juror's fitness would be affected is not shown. Possible prejudice against anarchists or socialists is not enough. See the *Connors* case, *supra*, p. 91.

In *Thiede* v. *Utah Territory*, 159 U. S. 510, a saloon keeper was convicted of murder. A juror admitted on the *voir dire* that he was prejudiced against the saloon business. He was held competent. The court said (p. 516):

> But the charge against the defendant, the matter to be tried, had no reference to the occupation in which he was engaged, and, therefore, a prejudice against such occupation is entirely immaterial. In *Spies* v. *Illinois*, 123 U. S. 131, a juror testified to a decided prejudice against socialists and communists, as the defendants were said to be, but as the charge to be tried was murder, and there was no prejudice against the defendants as individuals, he was accepted and sworn as a juror.

The *Spies* case is conclusive against the defendants on the present point. See 123 U. S. 172, 174, 176, 179.

No. 680.

Louis Kramer and Morris Becker, plaintiffs in error, v. The United States.

I.

THE EVIDENCE WARRANTED THE CONVICTION.

The indictment was for a conspiracy of Kramer, Becker, Walker, and Sternburg, to induce men of draft age not to register. Section 5, act of May 18, 1917; section 37, section 332 of the Criminal Code, act of March 4, 1909, c. 321, 35 Stat. 1088.

Walker was acquitted by the jury (R. 259), and Sternburg was discharged after a directed verdict (R. 241).

Evidence of the conspiracy on behalf of the Government was as follows: Kramer and Becker both testified that they were members of the No-Conscription League (R. 90, 105, 106, 108, 177). They attended its meetings (R. 201) and believed in its principles (R. 96, 102, 187). The purpose of the league was to resist conscription by all means in its power (R. 102), and to aid conscientious objectors who came in conflict with the Government (R. 266).

Becker and Kramer were members of a committee of the league formed to advertise a mass meeting proposed for Hunt's Point Palace on June 4, the eve of registration (R. 95, 105, 112, 196, 263). The committee agreed to hand out circulars announcing the

proposed meeting (Govt. Ex. 1, R. 16, 263) at a public gathering in Madison Square Garden on May 31, 1917 (R. 95, 105, 106, 110). Kramer and Becker repaired to the Madison Square Garden on the evening of May 31. They were seen talking together (R. 14). Both held bundles containing the advertising circulars (Govt. Ex. 1); also smaller circulars [1] containing the platform of the No-Conscription League (R. 19, Govt. Ex. 2, R. 264). The defendants were distributing both kinds of circulars (R. 15, 25, 35, 80, 117, 231). Kramer motioned with his hands as to the direction in which the bundles should be distributed (R. 14, 81). He seemed to be the boss of the committee work (R. 28, 85).

While Kramer was handing out pamphlets he was overheard to tell an unknown man not to register, that it would help the cause (R. 35, 36, 44, 82, 84).

The defendants were arrested on the spot (R. 53, 178), having still in their possession both classes of circulars (Kramer, R. 19, 37, 209, 228; Becker, R. 53, 54). While the officers were taking Kramer away he called to some one in the crowd to tell the chief (R. 53, 70).

Seven overt acts are charged: (1) On May 31, 1917, Kramer gave a leaflet entitled "No-Conscription" (Govt. Ex. II), signed by the No-Conscription League, to an unknown person, and requested him to refuse to register; (2) on May 31, 1917, Kramer

[1] These circulars are the same as those introduced in the Goldman and Berkman case. Excerpts are printed *infra*, p. 114.

gave to one Finan a leaflet entitled "No-Conscription." "Mothers, Fathers, Sons—turn out to protest against conscription" (Govt. Ex. 1), and requested Finan to refuse to register; (3) Becker on May 31, 1917, gave to several unknown persons the latter leaflet; (4) Becker on May 31, 1917, had in his possession a number of pamphlets of the first title; overt acts 5, 6, and 7 are alleged to have been committed by Walker and Sternburg (R. 6, 7). Proof of commission of overt acts was ample. As to the first overt act charged see R. 35, 36, 43, 82, 84; as to the second see R. 16, 72; as to the third see R. 53, 96. The overt acts in themselves constitute proof of the character of the conspiracy.

The testimony for the defense consisted largely in a series of denials (see R. 261, 262). The charge of the court was fair (R. 243). The jury were entitled to believe the testimony of the Government's witnesses, and justly arrived at the verdict of guilty.

No. 702.

Emma Goldman and Alexander Berkman, Plaintiffs in Error, v. United States.

The brief for plaintiffs in error in this case presents two points in addition to the contention of unconstitutionality: (1) That the indictment is insufficient; (2) that there was no evidence of defendants' guilt.

I.

THE INDICTMENT WAS SUFFICIENT.

The indictment charged that the defendants, together with divers unknown persons, conspired to induce men of draft age not to register as required by section 5 of the act of May 18, 1917, Public No. 12, 65th Congress; section 37 and section 332 of the Criminal Code (35 Stat. 1088, c. 321). Five overt acts are charged (R. 2–6) and, as acts, admitted: (1) Emma Goldman on May 18 made a speech at a public meeting in the Harlem River Casino in New York (R. 137); (2) Berkman on June 1 published "The Blast," vol. 2, No. 5 (R. 55, 111, 171, 475); (3) on June 2 Miss Goldman gave to one Haggerty a copy of the June, 1917, issue of "Mother Earth" (R. 130, 132, 478); (4) Berkman delivered an address on June 4 at Hunt's Point Palace; and (5) Emma Goldman delivered a speech at the same time and place (R. 165, 421).

The indictment states a crime. It is not a necessary ingredient that the purpose of the conspiracy be consummated. There is no merit in point one.

II.

THE EVIDENCE OF GUILT WAS AMPLE.

Evidence on behalf of the Government tending to prove the conspiracy is as follows:

Defendants, if not the organizers, were active members and leading spirits of the No-Conscription League (R. 18, 19). The fact of the confederation between the two defendants and others is shown by their work in connection therewith. The organization was effected on May 9, 1917, at Miss Goldman's apartment, both defendants being present (R. 22, 23, 33). Plans were laid for the mass meeting of May 18 (R. 24). Further preliminary meetings of the inner circle were held on Wednesday evenings May 16 and 23 (R. 258, 343). Both defendants were present on May 16, when plans for the mass meeting of May 18 were perfected (R. 27, 63). Berkman presided over the group meeting of May 23 (R. 242), also held at Miss Goldman's apartment (R. 281), at which arrangements were made for the mass meeting of June 4. Miss Goldman being in Massachusetts at the time, sent a message purporting to give her stand on registration (R. 531).

The office of the league was in the same building in which the defendants had offices (R. 17). Berkman held the money collected (R. 42, 43, 47, 465); ordered and paid for thousands of circulars (R. 95,

96, 100, 103, 104); rented the Harlem River Casino for the mass meeting of May 18 (R. 28, 29, 454, 455).

The purpose of the league was, as its name implied, to work against conscription. A manifesto was issued May 25, 1917, announcing in part as follows (R. 453):

> The No-Conscription League has been formed for the purpose of encouraging conscientious objectors to affirm their liberty of conscience and to make their objection to human slaughter effective by refusing to participate in the killing of their fellow men. The No-Conscription League is to be the voice of protest against the coercion of conscientious objectors to participate in the war. Our platform may be summarized as follows:
>
> We oppose conscription because we are internationalists, anti-militarists, and opposed to all wars waged by capitalistic governments.
>
> We will fight for what we choose to fight for; we will never fight simply because we are ordered to fight.
>
> We believe that the militarization of America is an evil that far outweighs, in its anti-social and anti-libertarian effects, any good that may come from America's participation in the war.
>
> We will resist conscription by every means in our power, and we will sustain those who, for similar reasons, refuse to be conscripted.
>
> (R. 454) Resist conscription. Organize meetings. Join our League. Send us money. Help us to give assistance to those who come in conflict with the government. Help us

to publish literature against militarism and against conscription.

We consider this campaign of the utmost importance at the present time. Amid hateful, cowardly silence, a powerful voice and an all-embracing love are necessary to make the living dead shiver.

NO-CONSCRIPTION LEAGUE,
20 East 125th St., New York.

In order to enlist as many as possible in the effort to resist "by every means in our power" and to "sustain those who, for similar reasons, refuse to be conscripted," large public mass meetings were arranged, at which direct appeals were made not to register. On May 18 at the Harlem River Casino mass meeting the defendant Goldman said in part (R. 138, 478):

We don't believe in conscription, this meeting to-night being a living proof. This meeting was arranged with limited means. So, friends, *we who have arranged the meeting* are well satisfied if we can only urge the people of entire New York City and America, there would be no war in the United States—there would be no conscription in the United States—(applause)—if the people are not given an opportunity to have their say.

(R. 482) Now, friends, do you suppose for one minute that this Government is big enough and strong enough and powerful enough to stop men who will not engage in the war because they don't want the war, because they don't believe in the war, because they are not going

to fight a war for Mr. Morgan? What is the Government going to do with them? They're going to lock them up. You haven't prisons enough to lock up all the people (applause).

(R. 483) How many people are going to refuse to conscript, and I say there are enough. I would count at least 50,000, and there are enough to be more, and they're not going to when only they're conscripted. They will not register (applause).

We are going to support all the men who will refuse to register and who will refuse to fight (applause). (See also R. 161, 404.)

We want you to fill out these slips and as you go out drop them into the baskets at the door. We want to know how many men and women of conscriptive age—and they're going to take women and not soldiers.

(R. 484) We will have a demonstration of all the people who will not be conscripted and who will not register. * * *

I will say, in conclusion, that I, for one, am quite willing to take the consequences of every word I said and am going to say on the stand I am taking. I am not afraid of prison—I have been there often.

(R. 485) So, friends, it is our decision tonight. We are going to fight for you, we are going to assist you and co-operate with you, and have the grandest demonstration this country has ever seen against militarism and war. What's your answer? Your answer to war must be a general strike, and then the governing class will have something on its hands. (See R. 161, 162, 410–415, 417—Ex. 61, 62, R. 513.)

This language is from the stenographic reports. There can be no doubt of its correctness. Two stenographers, neither of whom knew that the other was there, caught the same language, the notes and transcripts not being compared (R. 137, 138, 417).

On the eve of registration, June 4, at Hunt's Point Palace, another mass meeting was held (R. 71, 72). Many men of draft age were among the thousands present (R. 360). Both defendants made speeches, which were reported by a stenographer employed by defendants (R. 165, 487). The report is admittedly correct (R. 421). Berkman said in part (R. 487):

> But we say further to you, if you believe in liberty, if you pretend to fight for liberty and democracy how can you force us to do what we don't want to do? (Great applause and cheering.)
>
> (R. 489) Don't make light of it, because it is the most terrible and tragic moment in the life of the country. Conscription in a free country means the cemetery of liberty, and if conscription is the cemetery then registration is the undertaker. (Great applause and cheers and boos, and something thrown at the speaker that looked like a lemon.)
>
> All right, I am talking now; you can talk later. (Some one in the gallery threw something at the speaker and said something the stenographer could not understand.) Those who want to register should certainly register, but those who know what liberty means, and I am sure there are thousands in this country,

> they will not register. (Many hurrahs and great applause.) There have been many black days, many black Fridays, and black Sundays in the history of this country. * * * But there is going to be a blacker day, not a black Friday, but a black Tuesday. (Great applause.) And I believe that those who realize the full significance of forcing a supposedly free country into an armed camp, those who realize that should put on mourning tomorrow.

At the same meeting the defendant Goldman said (R. 492):

> We say that those who believe in war, believe in conscription and in militarism and should do their duty and fight. We have no objection against it, but we refuse to be compelled to fight when we don't believe in war and when we don't believe in militarism and when we don't believe in conscription. * * *
>
> (R. 494) Now, friends, I am here frankly and openly telling you that I will continue to work against Conscription.
>
> * * * Now friends, if I do not tell you tonight not to register, it is not because I am afraid of the soldiers, or because I am afraid of the police. I have only one life to give, and if my life is to be given for an ideal, for the liberation of the people, soldiers, help yourselves. My friends, the only reason that prevents me telling you men of conscriptable age not to register is because I am an Anarchist, and I do not believe in force morally or otherwise to induce you to do anything that is against your conscience, and that is

> why I tell you to use your own judgment and rely upon your own conscience. It is the best guide in all the world. If that is a crime, if that is treason, I am willing to be shot.
>
> (R. 497) Don't forget, friends, that the opposition to conscription only begins, it does not end tonight.

The direct purpose of the league to procure as many men as possible not to register is apparent from these speeches. It is also demonstrated by the appeal for support dated May 25, 1917, which contains the following (R. 138, 455, 456, 457):

> (R. 456) * * * There are thousands of men who will not under any circumstances allow themselves to be conscripted. * * * Something must be done to sustain these men to whom the Ideal of Liberty and Human Solidarity is not a mere phrase, but a vital, living fact.
>
> With that in view, we have organized the *No-Conscription League.* Its first public activity took place on Friday evening, May 18th—a mass meeting attended by 8,000 men and women who pledged their decision not to register or to be conscripted into killing.

This was sent out to thousands of persons whose names were furnished by the defendants. Letters to those on Berkman's list were signed "Alexander Berkman"; those on Miss Goldman's list were signed in her name. (R. 30–33, 37, 38, 458, 463.)

The theory of the defendants was that they directed their efforts against conscription yet did not give advice not to register, but refused to give such

advice (R. 204); that they advised that each should do as his judgment and conscience dictated [1] (R. 60, 209, 228, 232, 252, 531). This notion is still insisted upon in defendant's brief.

According to their own confession, therefore, they did not advise obedience to the law; but that the conscientious objector should disobey, if his judgment so dictated.

Grant that defendants did distinguish between conscription and registration, the result reasonably deduced from advice not to be conscripted is to refuse to take the first step. Defendants' witness, Lind, understood Miss Goldman to say at the meeting on June 4 that all conscientious objectors would be assisted by the No-Conscription League whether they got into difficulties from refusal to register or from refusal to obey orders after registration (R. 404, 405).

But defendant's own words demolish their theory. Both distinctly and expressly solicited refusal to register. On June 2 "The Blast" was published by Berkman, and on June 1 "Mother Earth" was issued by Miss Goldman. The June "Blast" contains the following (R. 475, 476):

REGISTRATION.

> Registration is the first step of conscription. The war shouters and their prostitute press, bent on snaring you into the army, tell you

[1] At the meeting of the esoteric on May 23, Attorney Weinberger spoke. In the group there was "appreciation expressed that advice not to register would land the person so advising in jail." (R. 287.)

that registration has nothing to do with conscription.

They lie.

Without registration, conscription is impossible.

* * * * *

Every beginning is hard. But if the government can induce you to register, it will have little difficulty in putting over conscription.

By registering you wilfully supply the government with the information it needs to make conscription effective.

* * * * *

(R. 477) The consistent, conscientious objector to human slaughter will neither register nor be conscripted.

ALEXANDER BERKMAN.

* * * * *

WAR DICTIONARY

ALEXANDER BERKMAN

Allies—The fairies of Democracy.

Conscription—Free men fighting against their will.

Liberty Bond—A bone from a bonehead.

Militarism—Christianity in action.

Patriotism—Hating your neighbor.

Registration—Funeral march of Liberty.

Trenches—Digging your own grave.

The June number of "Mother Earth," published and edited by Miss Goldman (R. 112–114, 170), also speaks to the point (R. 467–473):

(R. 470) What, then, is to be done?

We can decide for no one. We do not claim omniscience, nor the gift of prophecy.

But we can point out certain self evident truths. Draw from them your own conclusions and decide your course of action. * * * There are no subtle distinctions made by liberty loving people in their objection to conscription in toto. Why, then, should there be no militant objection to the first integral part of it—REGISTRATION?

* * * * *

Registration is literal and final in its meaning. *It is the first step over the precipice into the bottomless pit of conscription.* It is the first and only step necessary toward the establishment of an institution only comparable to the now extinct Third Section of Russia. It is the resignation of the rights of the individual to a militarily supervised government. It implies the abrogation of every instinct as well as any principle you may have against bearing arms. It means that you sanction and wilfully choose obedience and that you repudiate your right to resistance. * * *

Do what your conscience dictates on June 5th and thereafter.

CONCLUSION.

The writs of error and the appeal should be dismissed or the several judgments of the courts below affirmed.

JOHN W. DAVIS,
Solicitor General.

ROBERT SZOLD,
Attorney.

DECEMBER, 1917.

APPENDIX "A."

STATUTES REQUIRING MILITIA SERVICE PRIOR TO THE ADOPTION OF THE CONSTITUTION.

CONNECTICUT.

Book of Gen. Laws (Green 1673, p. 49).
Acts and Laws, 1702, p. 76.
Acts and Laws, 1715, p. 78.
Acts and Laws, 1733 (Green, Laws to 1772, p. 155).
Acts and Laws, 1755 (Green, Laws to 1772, p. 277).
Acts and Laws, 1756 (Green, Laws to 1772, p. 284).
Acts and Laws, 1772 (Green, Laws to 1772, p. 373).
Acts and Laws, 1784, p. 144.

DELAWARE.

Laws of New Castle, Kent, and Sussex upon Delaware, p. 171 (1741).
Acts 1746, c. 84, Acts (Bradford, 1752), p. 301.
Act June 4, 1785, Laws 1785, p. 57.

GEORGIA.

Act Sept. 29, 1773, Colonial Records (Candler), Vol. XIX, pt. 1, p. 291.
Act Jan. 24, 1755, Colonial Records (Candler), Vol. XVIII, p. 7.
April 24, 1760, Colonial Records (Candler), Vol. XVIII, p. 426.
Act November 15, 1778, Colonial Records of Ga. (Candler), Vol. XIX, pt. 2 (1774–1805), p. 103.
Act February 26, 1784, Colonial Records (Candler), Vol. XIX, pt. 2, p. 348.

MARYLAND.

Act June 3, 1715, c. 43.
Act June 8, 1719, c. 1.
Act Nov. 3, 1722, c. 15.

Act Apr. 12, 1733, c. 7.
Laws June, 1777, c. 17.
Laws Oct., 1777, c. 21.
Laws Oct., 1778, c. 10.
Laws June, 1780, c. 3.
Laws May, 1781, c. 15.
Laws Nov., 1783, c. 1.

MASSACHUSETTS.

Act Nov. 22, 1693, c. 3, Acts and Resolves, Province of Massachusetts Bay, Vol. I, p. 128.

Act June 23, 1748, c. 7, Acts, *supra*, Vol. III, p. 420.

Act January 22, 1776, c. 10, Acts, *supra*, Vol. V, p. 445.

Act Nov. 14, 1776, c. 21, Acts and Laws 1776–1780, p. 89, Acts and Resolves, Province of Massachusetts Bay, v. 5, p. 595.

Act March 13, 1778, c. 24, Acts, *supra*, Vol. V, p. 778.

Resolve of June 12, 1778, c. 51, p. 13, May, 1778–Jan. 1781.

Resolve of June 30, 1781, c. 98, Laws and Resolves of Massachusetts, 1780–81, p. 674.

Act Mar. 3, 1781, Laws of 1781, c. 21, pp. 32.

Act Mar. 10, 1785, c. 55, Perpetual Laws 1780 to 1789, p. 338.

The following statutes provided for impressment into His Majesty's army—the statutes of 1758–9 for an expedition into Canada:

Act 1693–4, c. 4, Acts, *supra*, Vol. I, p. 133.
Act 1699–1700, c. 19, Acts, *supra*, Vol. I, p. 398.
Act 1702, c. 6, Acts, *supra*, Vol. I, p. 499.
Act 1724–25, c. 6, Acts, *supra*, Vol. II, p. 333.
Act 1744, c. 2, Acts, *supra*, Vol. III, p. 144.
Act 1748–9, c. 5, Acts, *supra*, Vol. III, p. 417.
Act 1753–4, c. 41, Acts, *supra*, Vol. III, p. 734.
Act 1755–6, c. 12, Acts, *supra*, Vol. III, p. 872.
Act 1756–7, c. 23, Acts, *supra*, Vol. III, p. 1024.
Act 1757–8, c. 34, Acts, *supra*, Vol. IV, p. 86.
Act 1758–9, c. 3, Acts, *supra*, Vol. IV, p. 157.
Act 1758–9, c. 21, Acts, *supra*, Vol. IV, p. 191

NEW HAMPSHIRE.

Province Laws, 1688, c. 18, 1 Metcalf's ed., 221.
Province Laws, 1689, c. 49, 1 *id.*, 297.
Province Laws, 1689, c. 55, 1 *id.*, 299.
Province Laws, 1689, c. 98, 1 *id.*, 318.
Province Laws, 1689, c. 117, 1 *id.*, 324.
Province Laws, 1689, c. 119, 1 *id.*, 325.
Province Laws, 1689–90, c. 234, 1 *id.*, 371.
Province Laws, 1689–90, c. 243, 1 *id.*, 376.
Province Laws, 1689–90, c. 245, 1 *id.*, 377.
Province Laws, 1689–90, c. 249, 1 *id.*, 378.
Province Laws, 1690, c. 276, 1 *id.*, 395.
Province Laws, 1690, c. 30, 1 *id.*, 413.
Province Laws, 1690, c. 87, 1 *id.*, 314.

(The above laws were enacted during the period when New Hampshire and Massachusetts were joined under one government.)

Act Oct. 6, 1703, c. 1, 2 Metcalf's ed., 55.
Act May 14, 1718, c. 21, 2 *id.*, 284.
Act May 2, 1719, c. 14, 2 *id.*, 347.
Act Feb. 25, 1739–40, c. 4, 2 *id.*, 575.
Act Feb. 28, 1745–6, c. 8, 3 *id.*, 17.
Act Sept. 19, 1776, c. 3, Metcalf's ed., v. 4, p. 39.
Act of March 18, 1780, c. 12, Metcalf's ed. Laws N. H., v. 4, p. 273, 281.

NEW JERSEY.

Act May 8, 1746, 1st sess., c. 200, Acts (Allinson, 1776), p. 139.
Act Dec. 21, 1771, 4th sess., c. 539, Acts (Allinson, 1776), p. 343.
Act March 15, 1777, c. 20, acts September, 1776, p. 26.
Act September 9, 1777, c. 44, acts September, 1777, p. 98.
Act June 2, 1779, c. 24, acts May, 1779, p. 58.
Act June 12, 1779, c. 44, acts May, 1779, p. 113.

Act of Oct. 4, 1690, Colonial Laws of New York, 1664–1719, vol. 1, p. 219.

Act May 6, 1691, c. 5, Laws, *supra*, p. 231.

Act Oct. 18, 1701, c. 95, Laws, *supra*, p. 454.

Act Nov. 27, 1702, c. 114, Laws, *supra*, p. 500.

Act June 19, 1703, c. 135, Laws, *supra*, p. 546.

Act June 27, 1706, c. 157, Laws, *supra*, p. 591.

Act Sept. 18, 1708, c. 168, Laws, *supra*, p. 611.

Act Sept. 20, 1709, c. 193, Laws, *supra*, p. 675.

Act Nov. 24, 1711, c. 235, Laws, *supra*, p. 745.

Act Dec. 10, 1712, c. 258, Laws, *supra*, p. 778.

Act July 1, 1713, c. 260, Laws, *supra*, p. 781.

Act July 5, 1715, c. 296, Laws, *supra*, p. 868.

Act June 30, 1716, c. 315, Laws, *supra*, p. 887.

Act May 27, 1717, c. 334, Laws, *supra*, p. 917.

Act July 3, 1718, c. 357, Laws, *supra*, p. 1001.

Act November 19, 1720, c. 385, Colonial Laws of New York, 1720–1737, vol. 2, p. 1.

Act July 27, 1721, c. 419, Laws, *supra*, p. 84.

Act July 24, 1724, c. 448, Laws, *supra*, p. 187.

Act Aug. 31, 1728, c. 511, Laws, *supra*, p. 421.

Act Oct. 17, 1730, c. 553, Laws, *supra*, p. 657.

Act Sept. 30, 1731, c. 563, Laws, *supra*, p. 698.

Act October 14, 1732, c. 573, Laws, *supra*, p. 734.

Act November 1, 1733, c. 598, Laws, *supra*, p. 821.

Act Nov. 13, 1734, c. 617, Laws, *supra*, p. 858.

Act Nov. 8, 1735, c. 628, Laws, *supra*, p. 905.

Act Nov. 10, 1736, c. 637, Laws, *supra*, p. 922.

Act Dec. 16, 1737, c. 647, Laws, *supra*, p. 947.

Act Oct. 3, 1739, c. 674, Colonial Laws of New York, 1739–1755, vol. 3, p. 3.

Act Nov. 3, 1740, c. 694, Laws, *supra*, p. 69.

Act Nov. 27, 1741, c. 716, Laws, *supra*, p. 168.

Act Oct. 29, 1742, c. 730, Laws, *supra*, p. 224.

Act Dec. 17, 1743, c. 747, Laws, *supra*, p. 296.

Act Sept. 21, 1744, c. 771, Laws, *supra*, p. 385.

Act Nov. 29, 1745, c. 814, Laws, *supra*, p. 510.

Act Feb. 27, 1746, c. 816, Laws, *supra*, p. 511.

Act Dec. 6, 1746, c. 843, Laws, *supra*, p. 621.
Act Sept. 22, 1747, c. 849, Laws, *supra*, p. 648.
Act Dec. 12, 1753, c. 947, Laws, *supra*, p. 962.
Act Dec. 7, 1754, c. 963, Laws, *supra*, p. 1016.
Act Feb. 19, 1755, c. 972, Laws, *supra*, p. 1051.
Act Feb. 19, 1756, c. 996, Colonial Laws of New York, 1755–1769, vol. 4, p. 16.
Act Nov. 27, 1756, c. 1024, Laws, *supra*, p. 101.
Act Feb. 26, 1757, c. 1042, Laws, *supra*, p. 178.
Act Dec. 24, 1757, c. 1048, Laws, *supra*, p. 187.
Act Dec. 16, 1758, c. 1070, Laws, *supra*, p. 293.
Act Dec. 24, 1759, c. 1092, Laws, *supra*, p. 363.
Act Nov. 8, 1760, c. 1128, Laws, *supra*, p. 475.
Act Dec. 31, 1761, c. 1157, Laws, *supra*, p. 553.
Act Dec. 11, 1762, c. 1186, Laws, *supra*, p. 636.
Act Dec. 13, 1763, c. 1211, Laws, *supra*, p. 698.
Act Oct. 20, 1764, c. 1241, Laws, *supra*, p. 767.
Act Dec. 23, 1765, c. 1275, Laws, *supra*, p. 852.
Act Dec. 19, 1766, c. 1303, Laws, *supra*, p. 915.
Act Dec. 24, 1767, c. 1326, Laws, *supra*, p. 952.
Act March 24, 1772, c. 1541, Colonial Laws of NewYork, 1769–1775, vol. 5, p. 342.
Act April 1, 1775, c. 1700, Laws, *supra*, p. 732.
Act Mar. 31, 1778, c. 22, Laws, 1777–84 (ed. 1886), vol. 1, p. 45.
Act April 3, 1778, c. 33, Laws, *supra*, p. 62.
Act March 13, 1779, c. 33, Laws *supra*, p. 136.
Act October 9, 1779, c. 13, Laws *supra*, p. 157.
Act March 11, 1780, c. 53, Laws *supra*, p. 232.
Act March 11, 1780, c. 55, Laws *supra*, 3rd sess., p. 237.
Act Sept. 29, 1780, Laws *supra*, 4th sess., c. 4, p. 295.
Act March 10, 1781, c. 23, Laws *supra*, p. 336.
Act July 1, 1781, Laws *supra*, p. 393, 4th sess., c. 60.
Act Nov. 17, 1781, Laws *supra*, p. 410, 5th sess., c. 8.
Act April 4, 1782, Laws *supra*, p. 440, 5th sess., c. 27.
Act February 21, 1783, Laws *supra*, p. 529, 6th sess., c. 16.
Act April 4, 1786, c. 25, vol. 2, Laws, (ed. 1886) p. 220.

NORTH CAROLINA.

Laws 1715, c. 25, vol. 23 State Records, p. 29.
Laws 1746, c. 1, vol. 23 S. R., p. 244.
Laws 1760, c. 2, vol. 23 S. R., p. 518.
Laws 1764, c. 1, vol. 23 S. R., p. 596.
Laws April, 1777, c. 1, vol. 24 S. R., p. 1.
November, 1777, c. 15, c. 19, vol. 24 S. R., *supra*, pp. 113, 128.
April, 1778, third session, c. 1, vol. 24 S. R., *supra*, p. 190; c. 2, p. 198.
May, 1779, first session, c. 1, vol. 24 S. R., *supra*, p. 254.
Laws 1780, c. 24, vol. 24 S. R., p. 335.
Laws 1780, third session, c. 1, vol. 24 S. R., p. 358.
Laws 1781, first session, c. 1, vol. 24, S. R., p. 384.
Laws 1781, c. 10, vol. 24, S. R., p. 404.
Laws 1785, c. 1, vol. 24 S. R., p. 711.
Laws 1786, c. 22, vol. 24 S. R., p. 813.

PENNSYLVANIA.

Resolve, Sept. 14, 1776, v. 9, St. L., p. 567.
Act Feb. 14, 1777, c. 742, v. 9 St. L., p. 49 (see opinion of Judge Read in Kneedler v. Lane, 45 Pa. St., 286).
Act March 17, 1777, c. 750, v. 9 St. L., p. 75.
Act Dec. 30, 1777, c. 781, v. 9 St. L., p. 185
Act April 5, 1779, c. 843, v. 9 St. L., p. 381.
Act October 10, 1779, c. 865, v. 9 St. L., p. 440.
Act March 20, 1780, v. 10 St. L., c. 92, pp. 144, 156–7.
Act Sept. 28, 1781, v. 10 St. L., c. 950, p. 361.
Act March 21, 1783, c. 1022, 11 St. L., p. 91.
Act Sept. 22, 1783, c. 1038, 11 St. L., p. 161.
Act March 22, 1788, c. 1339, v. 13 St. L., p. 41.

RHODE ISLAND.

Act May 19, 1647, 1 Colonial Records, 153.
Act May 13, 1665, 2 *id.* 115.
Act. Aug. 13, 1673, 2 *id.* 495, 498; Laws 1673, p. 49
Act June 30, 1676, 2 *id.* 549.
Act May 1, 1677, 2 *id.* 567.
Act May 7, 1701, 3 *id.* 430.

Act May 6, 1702, 3 *id.* 453, Laws 1702, p. 76.
Laws May, 1718, *id.* Franklin, 1730, p. 96.
Act June 14, 1726, 4 Colonial Records, p. 377.
Acts and Laws 1730, p. 90.
Acts and Laws 1744, p. 66.
Act. March 14, 1757, 6 Colonial Records, p. 34.
Act August 10, 1757, 6 *id.* 75.
Acts and Laws 1767, p. 179.
Laws, June, 1775, p. 78.
Act April 17, 1777, 8 Colonial Records, p. 197.
Laws, October, 1777, p. 14.
Laws, December, 1777, p. 10.
Laws, June, 1778, p. 10.
Laws, October, 1779, p. 29.
Laws, Feb., 1781, pp. 5–8.
Laws, May, 1781, 2d sess., p. 11.
Laws, Aug., 1781, p. 39.

SOUTH CAROLINA.

Act Oct. 15, 1686, No. 30, 2 St. L. 15.
Act May 8, 1703, No. 206, 9 St. L. 617.
Act July 19, 1707, No. 270, 9 St. L. 625.
Act Sept. 2, 1721, No. 440, 9 St. L. 631.
Act May 30, 1734, No. 584, 9 St. L. 641.
Act April 3, 1739, No. 653, 9 St. L. 641.
Act June 13, 1747, No. 748, 9 St. L. 645.
Act March 28, 1778, No. 1076, 9 St. L. 666, 674, sec. 15.
Act Feb. 13, 1779, No. 1116, 4 St. L. 465.
Act Feb. 19, 1779, No. 1120, 4 St. L. 470.
Act Sept. 11, 1779, No. 1137, 4 St. L. 502.
Act Feb. 3, 1780, No. 1140, 4 St. L. 504.
Act Feb. 6, 1782, No. 1143, 4 St. L. 508.
Act Feb. 26, 1782, No. 1154, 9 St. L. 682.
Act March 17, 1783, No. 1188, 4 St. L. 567.
Act March 26, 1784, No. 1233, 9 St. L. 689.

October, 1705, 3 Hening's Va. Stat. L., p. 335; p. 362.
May, 1723, 4 *id.*, p. 118.
February, 1727, 4 *id.*, p. 197.
November, 1738, 5 *id.*, p. 16.
November, 1738, 5 *id.*, p. 81.
October, 1748, 6 *id.*, p. 112.
August, 1755, 6 *id.*, p. 521.
August, 1755, 6 *id.*, p. 530.
March, 1756, 7 *id.*, pp. 9, 14.
March, 1756, 7 *id.*, p. 26, 31.
April, 1757, 7 *id.*, p. 93.
April, 1757, 7 *id.*, p. 106.
February, 1759, 7 *id.*, pp. 274–275
November, 1762, 7 *id.*, p. 536.
November, 1766, 8 *id.*, p. 241.
July, 1771, 8 *id.*, p. 503.
July, 1775, c. 1, 9 Hening's St. L., p. 9.
December, 1775, c. 1, 9 Hening's, pp. 75, 89.
May, 1776, c. 12, 9 Hening's, p. 139.
May, 1777, c. 1, 9 Hening's, p. 267.
May, 1777, c. 7, 9 Hening's, p. 291.
May, 1781, c. 8, 10 Hening's, pp. 416, 421.
October, 1784, c. 28, 11 Hening's, p. 475.
October, 1785, c. 1, 12 Hening's, p. 9.

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APPENDIX "B."

DRAFT ACTS OF THE ORIGINAL STATES TO RECRUIT THE CONTINENTAL ARMY.

GEORGIA.

Act Aug. 5, 1782, Colonial Records, ed. Candler, v. 19, pt. 2, p. 155.

MARYLAND.

Laws March, 1778, c. 5, secs. 6 and 15.
Act Oct. 1780, c. 33, sec. 2.
Act Oct. 1780, c. 43, secs. 6 and 19.
Act May, 1781, c. 15, sec. 7.
Act Nov. 1781, c. 28, secs. 14 to 16.

MASSACHUSETTS.

Resolve June 16, 1781, c. 38, Laws and Resolves, 1780–1781, p. 621.

NEW HAMPSHIRE.

Act January 18, 1777, c. 5, Metcalf's ed. vol. 4, Laws, p. 77.
Act of June 26, 1779, c. 10, Laws, *supra*, p. 219.
Act June 16, 1780, c. 3, Laws, *supra*, p. 293.
Act June 27, 1780, c. 13; Laws, *supra*, 304.

NEW YORK.

Act April 1, 1778, c. 28, Laws of N. Y. v. 1, 1777–1784, p. 51.
Act of March 13, 1779, c. 33, Laws *supra*, p. 136, 137.
Act of July 1, 1780, c. 78, Laws *supra*, p. 284.
Act of July 1, 1781, 4th sess. c. 60, Laws *supra*, p. 393.
Act Mar. 23, 1782, 5th sess. c. 22, Laws *supra*, p. 433.

NORTH CAROLINA.

Laws November, 1777, c. 19, State Records, vol. 24, p. 128.

Laws of April, 1778, 1st sess., c. 1, State Records, vol. 24, p. 154.

Laws of November, 1779, c. 1, State Records, vol. 24, p. 262.

Laws 1781, c. 1, State Records, vol. 24, p. 362; c. 10, State Records, vol. 24, p. 404.

RHODE ISLAND.

Act July, 1780, 1st sess., pp. 6–10.
Act July, 1780, 2d sess., p. 27.
Act July, 1780, 2d sess., pp. 28–34.
Act November, 1780, p. 35.
Act January, 1781, p. 15.
Act March, 1781, p. 41.

SOUTH CAROLINA.

1778, v. 4, St. L., p. 410, No. 1075. Amended by act of October 9, 1778, No. 1103, 4 Stat. 453.

VIRGINIA.

Act May, 1777, c. 2, 9 Hen. 276–277.
Act October, 1777, c. 1, 9 Hen. 338–341.
Act October, 1778, c. 45, 9 Hen. 588.
Act May, 1779, c. 19, 10 Hen. 82
Act October, 1779, c. 50, 10 Hen. 214.
Act May, 1780, c. 12, 10 Hen. 259.
Act October, 1780, c. 3, 10 Hen. 326, 333.
Act May, 1782, c. 3, 11 Hen. 14.

APPENDIX "C."

STATUTES NOW IN FORCE IN THE STATES AND TERRITORIES IMPOSING COMPULSORY MILITIA SERVICE.

Statutes in the following States and Territories impose on the citizens thereof between the ages of 18 and 45 liability to service in the respective militias either by draft or otherwise.

Alaska, 31 Stat., 321, 322, c. 786, sec. 2.

Arkansas, Kirby & Castle Digest, 1916, c. 121, secs. 6234, 6235, 6240, pp. 1484, 1485.

California, Kerr's Cum. Supp., 1906–1913, secs. 1897, 1906, 1917, pp. 245, 247–8.

Connecticut, Pub. Acts, 1917, act March 8, 1917, secs. 1, 3, 4, 5, pp. 2225–2226.

District of Columbia, 25 Stat., 772–3, c. 328, secs. 1, 5, act March 1, 1889.

Georgia, Laws 1916, secs. 5, 9, pp. 159–60.

Idaho, Session Laws 1909, Senate Bill No. 75, secs. 1, 2, 3, 47, pp. 342, 343, 357.

Illinois, Laws 1917, p. 784; see Laws 1909, act June 10, 1909, p. 437, sec. 3.

Iowa, Code 1897, secs. 2167, 2169, p. 770.

Kentucky, Acts 1916, c. 43, secs. 2, 7, 109, 118, pp. 437, 440, 472, 476–7.

Louisiana, Acts 1912, No. 191, sec. 1, p. 337; Acts 1915–16, No. 264, secs. 9, 70, pp. 542, 548.

Maine, R. S. 1916, c. 15, secs. 1, 2, 10, pp. 296–7, 299.

Maryland, Anno. Code, (Bagby), vol. 2, art. 65, secs. 1, 2, 8, pp. 1476, 1478.

Michigan, Howell's Mich. Stats., vol. 1, 2d Ed., secs. 1588, 1590, pp. 712, 714.

Minnesota, Sess. Laws 1916–17, c. 400, secs. 2, 7, pp. 587–8.

Mississippi, Laws 1916, c. 245, secs. 1, 3, p. 383.

Montana, Rev. Codes, Supp. 1915, secs. 1045a, 1054, pp. 163, 165.

Nebraska, R. S. 1913, c. 41, secs. 3899, 3904, 3913, 3915, pp. 1114–15, 1118, 1119.

Nevada, Rev. Laws 1912, vol. 1, secs. 3982, 3984, 3986, 3998, pp. 1156–7, 1159.

New Hampshire, Pub. Acts. & Res. 1917, c. 123, secs. 1, 6, 29, pp. 52, 53, 55.

New Jersey, Comp. Stat. 1709–1910, vol. 3, pp. 3347–8, secs. 1, 2, 8, 9.

New Mexico, Statutes 1915, secs. 3810–11, 3815–16, pp. 1114, 1116.

New York, Consol. Laws 1909, vol. 3, pp. 2468–9, 2471–2, secs. 1, 2, 8, 9; Laws 1916, 139th sess., vol. 3, c. 568, secs. 9, 9a, pp. 1862–3.

North Carolina, Laws 1917, c. 200, secs. 1, 46, 47, 48, pp. 351, 360–1.

North Dakota, Comp. Laws, 1913, v. 1, c. 35, secs. 2347–8, 2353–4, pp. 568–9.

Oklahoma, Rev. Laws 1910, vol. 1, c. 46, secs. 3898–3900, 3904, 3906, 3908, pp. 1015, 1017, 1018.

Oregon, Gen. Laws, 1917, c. 327, secs. 1, 3, 13, 88, pp. 654–5, 657, 680.

Rhode Island, Gen. Laws 1909, Title XL, secs. 1, 136, 138, pp. 1364, 1388–9.

South Carolina, Code 1912, vol. 1, secs. 490, 494, 495, pp. 174, 175.

South Dakota, Comp. Laws 1913, vol. 1, pp. 621–2, secs. 1–4.

Tennessee, Thompson's Shannon's Code 1917, vol. 1, secs. 643a–643a–5, pp. 296–298.

Utah, Laws 1917, c. 99, secs. 1, 2, 3, 18, 19, 20, pp. 289, 290, 295–6.

Vermont, Laws 1917, act March 3, 1917, No. 168, secs. 1, 47, pp. 176, 185.

Washington, Laws 1917, c. 107, secs. 1, 9, pp. 361, 364–5.

West Virginia, Code 1906, secs. 571–2, 574, pp. 229–30.

Wyoming, Session Laws 1917, act February 21, 1917, c. 107, secs. 1, 20, pp. 168, 174.

APPENDIX "D."

MONROE'S LETTER OF OCTOBER 17, 1814, ON THE DRAFT BILL.

On October 17, 1814, Hon. James Monroe, then Secretary of War, addressed Hon. G. M. Troup, chairman of the Military Committee, House of Representatives, on the bill to increase the Military Establishment by draft. Excerpts from the letter, to be found in Niles' Weekly Register, vol. 7, page 137, are as follows:

Nor does there appear to be any well founded objection to the right in congress to adopt this plan (draft upon classes), or to its equality in its application to our fellow-citizens individually. Congress have a right, by the constitution, to raise regular armies, and no restraint is imposed in the exercise of it, except in the provisions which are intended to guard generally against the abuse of power, with none of which does this plan interfere. It is proposed, that it shall operate on all alike, that none shall be exempted from it except the chief magistrate of the United States, and the governors of the several states.

It would be absurd to suppose that congress could not carry this power into effect, otherwise than by accepting the voluntary service of individuals. It might happen that an army could not be raised in that mode, whence the power would have been granted in vain. The safety of the state might depend on such an army. Long continued invasions conducted by regular well disciplined troops, can best be repelled by troops kept constantly in the field, and equally well disciplined. Courage in an army is in a great measure mechanical. A small body well trained, accustomed to action, gallantly led on, often breaks three or four times the number of more respectable and more brave, but raw and undisciplined troops. The sense of danger is diminished by frequent exposure to it without harm: and confidence, even in the timid, is inspired in the knowledge that reliance may be placed on others, which can grow up only by service together. The grant to congress to raise armies was made with a knowledge of all these circumstances, and with the intention that it should take effect. The framers of the constitution, and the states who ratified it, knew the advantage

which an enemy might have over us, by regular forces, and intended to place their country on an equal footing.

The idea that the United States cannot raise a regular army in any other mode than by accepting the voluntary service of individuals, is believed to be repugnant to the uniform construction of all grants of power, and equally so to the first principles and leading objects of the federal compact. An unqualified grant of power gives the means necessary to carry it into effect. This is an universal maxim which admits of no exception. Equally true is it that the conservation of the state is a duty paramount to all others. The commonwealth has a right to the service of all its citizens, or rather, the citizens composing the commonwealth have a right collectively and individually to the service of each other, to repel any danger which may be menaced. The manner in which the service is to be apportioned among the citizens, and rendered by them, are objects of legislation. All that is to be dreaded in such case, is the abuse of power, and happily our constitution has provided ample security against that evil.

In support of this right in congress, the militia service affords a conclusive proof and striking example. The organization of the militia is an act of public authority, not a voluntary association. The service required must be performed by all, under penalties which delinquents pay. The generous and patriotic perform them cheerfully. In the alacrity with which the call of the government has been obeyed, and the cheerfulness with which the service has been performed throughout the United States by the great body of the militia, there is abundant cause to rejoice in the strength of our republican institutions, and in the virtue of the people.

The plan proposed is not more compulsive than the militia service, while it is free from most of the objections to it. The militia service calls from home for long terms whole districts of country. None can elude the call. Few can avoid the service, and those who do are compelled to pay great sums for substitutes. This plan fixes on no one personally, and opens to all who chose it a chance of declining the service. It is a principal object of this plan to engage in the defence of the state the unmarried and youthful, who can best defend it and best be spared, and to secure to those who render this important service, an adequate compensation from the voluntary contribution of the more wealthy in every class. Great confidence is entertained that such contribution will be made in time to avoid a draft. Indeed it is believed to be the necessary and inevitable tendency of this plan to produce that effect.

The limited power which the United States have in organizing the militia may be urged as an argument against their right to raise regular troops in the mode proposed. If any argument could be drawn from that circumstance, I should suppose that it would be in favor of an opposite conclusion. The power of the United States over the militia has been limited, and that for raising regular armies granted without limitation. There was, doubtless, some object in this arrangement. The fair inference seems to be, that it was made on great consideration, that the limitation in the first instance was intentional, the consequence of the unqualified grant of the second.

But it is said that by drawing the men from the militia service into the regular army, and putting them under regular officers, you violate a principle of the constitution which provides that the militia shall be commanded by their own officers. If this was the fact the conclusion would follow. But it is not the fact. The men are not drawn from the militia, but from the population of the country: when they enlist voluntarily, it is not as militia men that they act, but as citizens. If they are drafted it must be in the same sense. In both instances they are enrolled in the militia corps, but that, as is presumed, cannot prevent the voluntary act in one instance, or the compulsive in the other. The whole population of the United States within certain ages belong to these corps. If the United States could not form regular armies from them they could raise none. (pp. 139, 140.)

These plans (the draft) are thought more deserving the attention of the committee than any that have occurred. The first, for the reasons stated, is preferred. It is believed that it will be found more efficient against the enemy, less expensive to the public, and less burthensome on our fellow-citizens.

It has likewise the venerable sanction of our revolution. In that great struggle resort was had to this expedient for filling the ranks of our regular army, and with decisive effect.

It is not intended by these remarks, should the first plan be adopted, to dispense altogether with the service of the militia. Although the principal burthen of the war may thereby be taken from the militia, reliance must still be placed on them for important aids, especially in cases of sudden invasion. (pp. 140, 141.)

APPENDIX "E."

ANCIENT ENGLISH STATUTES PROVIDING FOR MILITARY SERVICE.

1 Edward III, stat. 2, c. 5 (A. D. 1325), 1 Stat. L., England, pp. 415-416:

Item, the King will that no man from henceforth shall be charged to arm himself, otherwise than he was wont in the time of his progenitors Kings of England; (2) and that no man be compelled to go out of his shire but where necessity requireth, and suddain coming of strange enemies into the realm; and that it shall be done as hath been used in times past for the defence of the realm.

1 Edward III, stat. 2, c. 7 (A. D. 1327), 1 Stat. L., England, p. 416:

Item, Whereas Commissions have been awarded to certain people of shires to prepare men of arms, and convey them to the King into Scotland or Gascoign, or elsewhere, at the charge of the shires; (2) the King hath not before this time given any wages to the said preparers and conveyers, nor soldiers whom they have brought, whereby the commons of the counties have been at great charge, and much impoverished; (3) the King will that it shall be done so no more.

18 Edward III, stat. 2, c. 7, 2 Stat. L., England, p. 13 (A. D. 1344):

(4) And that men of arms, hoblers, and archers, chosen to go in the King's service out of England, shall be at the King's wages from the day that they depart out of the counties where they were chosen, till their return.

25 Edward III, stat. 5, c. 8 (A. D. 1350), 2 Stat. L., England, p. 55:

Item, it is accorded and assented, that no man shall be constrained to find men of arms, hoblers, nor archers, other than those which hold by such services, if it be not by common assent and grant made in parliament.

The Statutes 1 Edward 3, 18 Edward III, and 25 Edward III above were confirmed in 4 Henry IV, c. 13, 2 Stat. L., England, p. 434 (A. D. 1402).

16 Car. I, c. 28, 5 Stat. Realm, 138, entitled "An Act for the better raising and levying of Souldiers for the present defence of the Kingdoms of England and Ireland" (A. D. 1640).

Forasmuch as great Commotions and (Rebellions) have beene lately raised and stirred up in his Majesties Kingdome of Ireland by wicked plots and conspiracies of diverse of his Majesties Subjects there (being traiterously affected) to the great endangering not onely of the said Kingdome but alsoe of this Kingdom of England unlesse a speedy course be taken for the preventing thereof and for the raising and pressing of men for those services And Whereas by the Laws of this Realm none of his Majesties Subjects ought to be (impressed) or compelled to go out of his county to serve as a souldier in the Wars except in case of necessitie of the sudden coming in of strange enemies into the Kingdom or except they be otherwise bound by the tenure of theire lands or possessions Therefore in respect of the great and urgent necessity of providing a present supply of men for the preventing of these great and imminent dangers and for the speedie suppressing of the said hainous and dangerous Rebellions. Be it enacted by authority of this psent Parliament that the Justices of the Peace of every County and Riding within this Realm * * * shall * * * raise levie and impresse so many men (for) Souldiers Gunners and Chirrugions as shall be appointed by order of the Kings Majestie his heires or successors and both Houses of Parliament for the said services and to command all and every the high Constables * * * to bring before them any such person or persons as shall be fit and necessary for the said services which said persons soe to be imprested as aforesaid and every of them shall have such imprest money * * * and such other necessary charges and allowances shall be made touching the said presse the said money and other charges and allowances to be paid by such persons and in such manner as by order of his Majesty his heires and succesors and of both Houses of Parliament shall be appointed And if any person or persons shall willfully refuse to be imprested for the said services that then it shall and may be lawfull to and for the said persons soe authorized as aforesaid to the said presse to commit such offender to prison. * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

656 Ruthenberg *v.* United States.
663 Arver *v.* United States.
664 Grahl *v.* United States.
665 Wangerin *v.* United States.
666 Wangerin *v.* United States.
680 Kramer *v.* United States.
681 Kramer *v.* United States.
702 Goldman *et al.* *v.* United States.
738 Jones *v.* Perkins.

CASES INVOLVING THE CONSTITUTIONALITY OF THE ACT OF MAY 18, 1917, GENERALLY KNOWN AS THE DRAFT ACT.

MOTION FOR LEAVE TO FILE THE FOLLOWING BRIEF PREPARED BY HANNIS TAYLOR AND JOSEPH E. BLACK, AS AMICI CURIÆ AND AS COUNSEL FOR ROBERT COX, WHO, AS A MEMBER OF THE NATIONAL MILITIA, HAS BEEN CONSCRIPTED UNDER SAID ACT, AND AS SUCH IS NOW IN TRAINING AT CAMP FUNSTON, KANSAS, FOR MILITARY SERVICE BEYOND THE TERRITORIAL LIMITS OF THE UNITED STATES. COX, A NATIVE-BORN AMERICAN YOUTH, AFTER AFFIRMING THE VALIDITY OF THE ACT, AND EXPRESSING HIS WILLINGNESS TO SERVE HIS COUNTRY AT HOME, APPEALS TO THE COURT BY HABEAS CORPUS TO SECURE TO HIM THE EXEMPTION FROM SERVICE ABROAD EXPRESSLY GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES.

PRESS OF GIBSON BROTHERS, INC., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

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656. Ruthenberg *v.* United States.
663. Arver *v.* United States.
664. Grahl *v.* United States.
665. Wangerin *v.* United States.
666. Wangerin *v.* United States.
680. Kramer *v.* United States.
681. Kramer *v.* United States.
702. Goldman, *et al.*, *v.* United States.
738. Jones *v.* Perkins.

Cases involving the constitutionality of the Act of May 18, 1917, generally known as the Draft Act.

MOTION OF HANNIS TAYLOR AND JOSEPH E. BLACK, AS AMICI CURIÆ, AND AS COUNSEL FOR ROBERT COX, FOR LEAVE TO FILE A BRIEF IN SAID CAUSES.

Now come Hannis Taylor and Joseph E. Black, members of the bar of this Court, as Amici Curiæ, and as counsel for Robert Cox, whose petition for *habeas corpus* is now pending in the District Court of the United States for the District of Kansas, at Kansas City, in said District, where it has been set for hearing on December 8, 1917, before the Honorable John C. Pollock, the Judge of said Court. A copy of said petition is hereto annexed as Appendix A. Upon its face it appears that the petitioner, a native born citizen of Richmond, Missouri, after being being duly conscripted under the terms of said Act as a

member of the National Militia, has been placed for military training in Camp Funston, situated in the counties of Geary and Riley in said State of Kansas, where he is to be held in military custody by General Leonard Wood until some time in the near future, when he is to be transferred to the battlefields of Europe, presumably to France. Said petitioner, after affirming the constitutionality of said Act of May 18, 1917, and expressing his willingness to serve under it as a member of said National Militia whenever it is called upon "to execute the laws of the Union, suppress insurrections and repel invasions," sets up the constitutional immunity or exemption from military service beyond the territorial limits of the United States, guaranteed to him, in express terms, by the Constitution of the United States. As petitioner is informed by counsel that his right to such constitutional exemption or immunity depends upon whether or no he is a member of the National Militia called forth by Congress "to execute the laws of the Union, suppress insurrections and repel invasions," his case must be won or lost by the conclusions this Court may reach as to the constitutional powers of Congress to legislate upon this subject matter in the above stated cases to be argued on or about the 10th of December. His counsel therefore move this Honorable Court to permit them to file the brief hereto annexed in his behalf in the above stated causes. It is the purpose of counsel to make the case of Robert Cox a test case on this vitally important question. If his petition for *habeas corpus* is denied by the District Court of Kansas, his case will, with all convenient speed, be brought to this Court by a direct appeal.

Entirely apart from the foregoing ground the undersigned move the Court for leave to file the brief annexed hereto as *Amici Curiæ* under the general discretion defined by it in Northern Securities Company *v.* United

States, 191 U. S. 555, in these terms: "And doubtless it is within our discretion to allow it [the filing of a brief by an *amicus curiæ* in a pending cause] *in any case when justified by the circumstances.* Green *v.* Biddle, 8 Wheat. 17; Florida *v.* Georgia, 17 How. 491; the Gray Jacket, 5 Wall. 370." As this Court knows, hundred of thousands, perhaps millions, of the younger citizens of the United States are vitally interested in the constitutional exemption or immunity set up by Robert Cox. His case therefore affects a large part of our population; it is of supreme interest to countless American households. Certainly such a nation-wide question should not be passed upon by this Court, even indirectly, without the most exhaustive argument, oral and written, at its bar. Therefore the undersigned appeal to the broad discretion of this Court, *entirely apart from any consent of counsel in pending cases,* to permit them to file the brief annexed hereto, not only as counsel for Robert Cox, but as *Amici Curiæ* for the hundreds of thousands of American citizens standing in his shoes.

HANNIS TAYLOR,
JOSEPH E. BLACK,
As Counsel for Robert Cox
and as Amici Curiæ.

APPENDIX A.

PETITION FOR WRIT OF HABEAS CORPUS.

In the District Court of the United States for the District of Kansas.

UNITED STATES OF AMERICA.

In the matter of Robert Cox, Ray County, Missouri, unlawfully detained and restrained of his liberty at Camp Funston in the Counties of Geary and Riley in the State of Kansas, by General Leonard Wood, the military commander thereof—the said Robert Cox being a member of the National Militia conscripted under the Conscription Act of May 18, 1917, and unlawfully restrained of his liberty under said Act.

Your petitioner, Robert Cox, humbly petitioning, showeth unto the Court as follows:

1. That your petitioner, having been born in the State of Missouri on the 31st day of August, 1895, is a citizen of the United States, and as such is subject to the operation of the Conscription Act of May 18, 1917, passed, as he is informed and believes, under that part of Sec. 8, Art. I, of the Constitution of the United States which provides that "The Congress shall have power . . . to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions." As a patriotic citizen, devoted to the Constitution and laws of his country, your petitioner, who has been duly conscripted under said Act, is not only ready but willing to serve as a member of said National Militia, for any one or all of the three purposes which the Constitution specifies.

2. That your petitioner further avers that he is advised and believes, and so charges, that he cannot be lawfully called upon to serve for any other purposes, that he cannot

be lawfully called upon as one conscripted under said Act to render military service beyond the territorial limits of the United States. Your petitioner further avers that he is informed and believes, and so charges, that the Congress, in enacting said legislation under which he has been drafted and confined in said Camp Funston, has not attempted to authorize, directly or indirectly, the transportation of said drafted National Militia "across the seas;" neither has it manifested any consciousness, by any positive utterance, that any such unprecedented act would be attempted by any one. Petitioner avers that in what is known as his Flag Day address, the President of the United States solemnly and truthfully declared that "American armies were never before sent across the seas."

3. That it is the constitutional right and immunity of your petitioner to be exempt, as a member of said conscripted National Militia, from service beyond the territorial limits of the United States, because, as he is informed and believes, and so charges, that such constitutional right and immunity, solemnly defined in Sec. 8, Art. I, of the Constitution, was recognized and affirmed by the Supreme Court of the United States in 1827; by Attorney General Wickersham in an official opinion, dated February 17, 1912, and by President Wilson, in four speeches delivered in January and February, 1916.

4. That despite such constitutional right and immunity from service abroad, your petitioner, together with thousands of other citizens of the United States, has been compelled to leave his home, and is now confined against his will by the military power of the United States, for the express, declared and unlawful purpose of being transported to the battlefields of Europe in open defiance of the Constitution of the United States. As early as July 16, 1917 (see Congressional Record of July 20, 1917, pp. 5864–5), the Secretary of War made a formal declaration

of the fact that not only the State Militia (now called the National Guard), but also the National Militia (now called the National Army) were to be sent to France with all convenient speed. Among other things the Secretary of War then said: "It is intended to send the National Guard, or such units thereof as are properly equipped and trained, to join the American expeditionary force in France before the additional forces authorized by the act above, now called the National Army, can be sent. When the plans for mobilizing these two forces were drawn it was not known how soon the National Army could be assembled under the draft." Your petitioner avers that since that date the conscripted National Militia (now called the National Army in order to conceal its real character) has been duly drafted, and is now being concentrated in camps to be therein detained for a few months prior to its transportation to the battlefields of Europe, under purely executive orders, to be made in open defiance of the Constitution of the United States. Your petitioner further avers that neither the American electorate nor the American Congress has ever spoken one word, indicating the desire, that the National Militia should be sent to the battlefields of Europe. Neither the electorate nor the Congress has authorized the Executive power to make any such order or orders, expressly forbidden by the Constitution of the United States.

5. That your petitioner is now unlawfully detained and restrained of his liberty at Camp Funston by the military power of the United States, because he is so detained and restrained for the sole, only and declared purpose of being transported very soon to the battlefields of Europe, under void Executive orders to be made by the Secretary of War in open defiance of the Constitution of the United States. That your petitioner will surely be so transported unless he is delivered by the order of this Honorable Court from such unlawful custody. Your petitioner further

avers that as the military commander of said Camp Funston is now General Leonard Wood, your petitioner is now detained by General Leonard Wood and restrained by him in the manner above set forth.

Wherefore, in consideration of the premises, your petitioner prays that a writ of habeas corpus may be granted and issued forthwith to the said General Leonard Wood, directing him to bring and have the body of your petitioner before this Honorable Court, or any Judge thereof, at a time and place in said writ to be specified to do and receive what shall then and there be considered by the Court concerning the time and cause of detention of your petitioner, and concerning the said writ, and that your petitioner may be restored to his liberty. And for such other and further relief as the nature of the petition may require.

HANNIS TAYLOR,
JOSEPH E. BLACK,
Attorneys for Petitioner.

(Signed) ROBERT COX,
Petitioner.

STATE OF KANSAS
COUNTY OF RILEY } *ss.*

Robert Cox, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition, and that he has read the same; that the matters and things therein alleged are true, except as to matters and things as are therein stated to be alleged on information and belief, and that, as to such, he believes them to be true.

(Signed) ROBERT COX.

Subscribed and sworn to before me this 2d day of November, 1917.

My term will expire March 22, 1921.

(Signed) T. W. SCOTT,
Notary Public.

[SEAL]
T. W. SCOTT, *Notary Public,*
Riley County, Kansas.

NOTICE

To the Honorable, the Attorney General of the United States; to the Honorable, the Solicitor General of the United States, Washington, D. C.; to C. S. Darrow, Chicago, Ill., Latimer & Latimer, Minneapolis, Minn.; H. F. O'Neill, 140 Nassau Street, New York; J. Gordon Jones, Cordele, Ga.

You are hereby notified that the undersigned, as counsel for Robert Cox, and as *Amici Curiæ*, on Monday, the 10th day of December, 1917, will on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit the foregoing motion to grant to them leave to file in the above stated causes numbered 656, 663, 664, 665, 666, 680, 681, 702, 738, in which you are counsel of record, a brief as counsel for Robert Cox and as *Amici Curiæ* for the reasons stated in the foregoing motion.

HANNIS TAYLOR,
JOSEPH E. BLACK.

Service of the foregoing notice of motion, with the said motion and brief therein referred to, is hereby acknowledged this — day of December, 1917.

. . . . . .

Service of the foregoing notice of motion, with the said motion and brief therein referred to, is hereby acknowledged this — day of December, 1917.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1917.

656. Ruthenberg *v.* United States.
663. Arver *v.* United States.
664. Grahl *v.* United States.
665. Wangerin *v.* United States.
666. Wangerin *v.* United States.
680. Kramer *v.* United States.
681. Kramer *v.* United States.
702. Goldman, *et al.*, *v.* United States.
738. Jones *v.* Perkins.

Brief offered by Hannis Taylor and Joseph E. Black, members of the Bar of this Court, as amici curiæ, concerning the constitutional questions involved in these cases, arising, as they do, out of the Act of May 18, 1917, generally known as the Draft Act, leave having been asked to file such brief for the reasons stated in the foregoing motion.

IS THE ACT OF MAY 18, 1917, GENERALLY KNOWN AS THE DRAFT ACT, A CONSTITUTIONAL AND VALID LAW?

Since the foundation of this Government only two conscription acts have been enacted by the Congress of the United States; the first, the Act of March 3, 1863, entitled, "*An Act for enrolling and calling out the National Forces, and for other purposes;*" the second, the Act of May 18, 1917, entitled, "*An Act to authorize the President*

to increase temporarily the Military Establishment of the United States." For the convenience of the Court these acts—the only two conscription acts ever enacted by the Congress of the United States—have been printed in parallel columns in Appendix B hereto. In the preamble of the Act of March 3, 1863, the clear and positive declaration is made that it was enacted under Section 8, Article I, of the Constitution, which provides that "The Congress shall have power to provide for calling forth the militia to execute the laws of the Union, *suppress insurrections and repel invasions.*" The terms of the preamble are these:

> Whereas there now exist in the United States AN INSURRECTION AND REBELLION against the authority thereof, and it is, under the Constitution of the United States, the duty of the government to SUPPRESS INSURRECTION AND REBELLION, to guarantee to each State a republican form of government, and to preserve the public tranquility; and whereas, for these high purposes, a military force is indispensable, to raise and support which all persons ought willingly to contribute; and whereas no service can be more praiseworthy and honorable than that which is rendered for the maintenance of the Constitution and Union, and the consequent preservation of free government: Therefore, etc.

So clear was it to the jurists and statesmen of that epoch that the Congress, when it deems it necessary, under Section 8, Article I, of the Constitution, to call forth the *National Militia* (it can call forth no other) "to execute the laws of the Union, suppress insurrections and repel invasions," *may do so by conscription*—no real contest of the right was made by any one. Certainly no attempt was ever made to challenge the constitutionality of the Conscription Act of March 3, 1863, in this Court.

ACT OF MAY 18, 1917, A SUBSTANTIAL REPRODUCTION OF THE ACT OF MARCH 3, 1863, SO FAR AS CONSCRIPTION IS CONCERNED. It is certainly a notable fact that the *National Militia*—a creation of the Federal Convention of 1787—was never called into existence until the Act of March 3, 1863, "called it forth" by conscription. An *insurrection* had to be put down; the regular army of the United States, resting exclusively on the volunteer principle, and the systems of state militia, resting on the same principle, were inadequate to the occasion. The contingency contemplated by Section 8, Article I, had arrived. The *National Militia* was therefore called out to *put down an insurrection*. After the lapse of fifty-four years the *National Militia* was called forth *a second time* by the Conscription Act of May 18, 1917, "to execute the laws of the Union, suppress insurrections and *repel invasions*." Is it strange that, under such circumstances, the Congress, *with only one precedent of conscription to guide it*, should have made the Act of May 18, 1917, a substantial reproduction of the Act of March 3, 1863, *so far as conscription is concerned?* That all important *record fact* is manifest on the face of the two acts printed in parallel columns in Appendix B. The absence of a preamble in the Act of May 18, 1917, in nowise weakens the fact its subject-matter so clearly establishes. *The Court will observe that the act last named never intimates, directly or indirectly, in any part of it that the conscripts who are "called forth" by it are to be used outside of the territorial limits of the United States.* It does not attempt to authorize such a use, or to vest in the President the power so to employ them. No one, therefore, has the right to charge or even to intimate that when Congress called forth the *National Militia* by conscription in the Act of May 18, 1917, it had the slightest idea that it would be used for any except the three purposes expressly defined in Section 8, Article I. The pur-

pose of this brief is to demonstrate (1) that the Conscription Act in question is constitutional and valid because it was enacted by Congress, as the Act of March 3, 1863, was enacted, under Section 8, Article I, of the Constitution, which provides that "The Congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;" (2) that if such Act of May 18, 1917, can not be upheld by virtue of that clause, it is null and void.

THE MILITIA AS A NATIONAL DEFENSE FORCE THE OLDEST ELEMENT IN THE ENGLISH CONSTITUTIONAL SYSTEM.

The ancient landfyrd, the militia of the English shire, is as old as the shire system itself. From the earliest times in England the obligation of military service for the protection of the State rested upon every freeman, *who could be forced to perform it by law.* That obligation was embodied in the inevitable *trinoda necessitas*, which consisted of military service in the field, and in the repair of bridges and fortresses. "This common burden was the *trinoda necessitas* in its origin required of all people, not resting on land, and therefore, not the subject of immunity." *Essays in Anglo-Saxon Law*, p. 61. See also Digby, *Law of Real Property*, p. 22. *The right to conscript the militia for home defense is as old as English law itself.* The militia thus drawn from the shires was the only military force that Alfred the Great could "call forth" against the Danes; it was the only military force that Harold could "call forth" to oppose the Norwegians in the great fight at Stamfordbridge; it was the only military force that Harold could "call forth" to oppose the Normans. Harold lost the battle of Hastings because the "main forces [militia] of Northumberland and northwestern Mercia came not to King Harold's muster." Freeman, *Norm. Conq.*, iii, p. 282. The county military system, known as the militia, survived the Norman Conquest unimpaired.

Stubbs, *Select Charters*, pp. 153–4. By the great statute of I Edw. III, c. 5, *purely declaratory*, it was provided that the militia could only be used at home for national defense, "*as has been used in times past for the defense of the realm.*" Down to 1786, the year before the meeting of the Federal Convention, it was not legally possible to take the English militia over the border into Scotland. In 1786 that was made possible by the Act of 26 Geo. III, c. 107, Sec. 95, concerning the militia, in which it was provided that "*neither the whole nor any part shall be ordered out of Great Britain.*" In the words of the Enc. Brit. (9 ed.): "The Militia of the United Kingdom consists of a number of officers and men maintained for the purpose of augmenting the military strength of the country in case of imminent national danger or great emergency. In such a contingency the whole or any part of the Militia is liable, by proclamation of the sovereign, TO BE EMBODIED, *that is to say, placed in active service within the confines of the United Kingdom.*" Mr. Dicey, one of the most eminent, certainly the most business-like and practical commentator on the modern English constitution, says *in his edition of 1908*: "EMBODIMENT *indeed converts the militia for the time being into a regular army*, THOUGH AN ARMY WHICH CAN NOT BE REQUIRED TO SERVE ABROAD."

Thus the fact is put beyond all question that down to 1908 the English Constitution forbade, *as it had for a thousand years*, the transportation of the militia abroad even after it was "*embodied*," that is, converted "*for the time being into a regular army.*" Dicey, *The Law of the Constitution*, pp. 287–8. AND SO, AFTER THE PRESENT WAR BEGAN, THE ENGLISH CONSTITUTION HAD TO BE ALTERED BY PARLIAMENT BEFORE ANY PART OF THE MILITIA COULD BE SENT ACROSS THE CHANNEL TO FRANCE—SOMETHING THAT HAD NEVER HAPPENED BEFORE IN ENGLISH HISTORY.

ORIGIN AND GROWTH OF ENGLISH MILITARY FORCES FOR SERVICE ABROAD.

England never had a military force that could be sent abroad until William the Conqueror brought such a force with him in the feudal host of professional soldiers who accompanied him. It was the duty of that host, *which simply supplemented the ancient constitutional force known as the militia*, "to attend the king in war, *within and without the realm*, mounted and armed, *during the regular term of service*." But as that regular term of service only lasted for forty days, it led to the device known as scutage or shield-money, which produced a fund with which the crown could employ mercenary and professional soldiers—*volunteers*—who could be sent abroad and kept there by contract. Out of that *purely voluntary system* of paid military service was evolved the regular or standing army of England as it existed at the date of our severance from the mother country; and upon the same general basis rested the standing and professional naval force of England at that time.

THE REGULAR ARMY AND NAVY SYSTEMS OF ENGLAND, PURELY VOLUNTARY, REPRODUCED BY THE FEDERAL CONVENTION OF 1787.

When the question of creating a military system arose in the Federal Convention of 1787, there seems to have been no real controversy as to the basis upon which our regular army—volunteer army—and navy—volunteer navy—should be organized. As the regular army and navy of England then rested strictly on the volunteer system we simply reproduced that system in those provisions of the Constitution which, for convenience, will be called GROUP A, ESTABLISHING A REGULAR ARMY AND NAVY. The Convention of 1787, after giving to Congress the power "to declare war," provided, Section 8, Article I,

that "The Congress shall have power . . . to raise and support armies, but no appropriation of money to that use shall be for longer than two years [the English Mutiny Act of 1689]; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces." Those three provisions, grouped together as a connected whole, relate solely and exclusively to one subject matter—the creation, maintenance and government of the regular army and navy of the United States, which is now and has always been maintained "*by voluntary enlistment.*" This basic fact is perfectly well known even to professional soldiers who are not lawyers. General Upton, in speaking of the provisions in question, in his *Military Policy of the United States*, p. 79, says: "Here was laid the foundation of the *volunteer system*, which attained its fullest development during our long civil war. The 'levies,' known later as 'volunteers,' were authorized under *the plenary power of Congress to 'raise and support armies,'* and the power of appointing these officers was given the President, to whom it obviously belonged, as the 'levies' *were wholly distinct from the militia or State troops.*" For a century and a quarter Congress has been giving a practical construction to the constitutional clauses embraced in Group A, by *raising, supporting and governing* under them the regular army and navy of the United States as *volunteer systems, entirely separate and apart from the militia systems, National and State.*

BITTER OPPOSITION IN THE CONVENTION OF 1787 TO THE CREATION OF A NATIONAL MILITIA ENTIRELY INDEPENDENT OF THE STATES.

Each of the original thirteen States organized bodies of State militia after the English model. "Militia musters" became the rule in the States as in the mother country.

But when the Convention of 1787 met those who may be called the Nationalists, with Washington at their head, contending that the State military had proven to be "*inefficient under the Confederation*," demanded the creating of a *National Militia system*, entirely apart from the State systems, which should be under the exclusive control of the new Federal Government. See Madison Papers, p. 730 and p. clxxxii, Gilpin ed. The proposal to create a national militia was made by George Mason, who, on August 18, "introduced the subject regulating the militia. He thought such a power necessary to be given to the general government. He hoped there would be no standing army in time of peace, unless it might be for a few garrisons. The militia ought, therefore, to be the more effectually prepared for the public defense. Thirteen States will never concur in any one system, if the disciplining of the militia be left in their hands. If they will not give up the power over the whole, they probably will over a part as select militia." In supporting Mason's proposition Pierce Butler "urged the necessity of submitting the whole militia to the general authority, which had the care of the general defense; and Charles Pinckney, in contending that "Congress should have power to regulate the militia," said: "For a part to be under the general and a part under the State governments would be an incurable evil. He saw no room for such distrust of the general government." John Langdon next arose and said: "He saw no more reason to be afraid of the general government than of the State governments. He was more apprehensive of the confusion of the different authorities on the subject, than of either." The last word in favor of the creation of a National Militia was then spoken by James Madison, who said he "thought the regulation of the militia naturally appertained to the authority charged with the public defense. It did not seem, in its nature, to be

divisible between two distinct authorities. If the States would trust the general government with the power over the public treasure, they would, from the same consideration of necessity, grant it the direction of the public force. Those who had a full view of the public situation would, from the sense of the danger, guard against it. The States would not be separately impressed with the general situation, nor have the due confidence in the concurrent exertions of each other." In the course of the debate "General Pinckney mentioned a case, during the war, in which a dissimilarity in the militia of different States had produced the most serious mischiefs. Uniformity was essential. *The States would never keep up a proper discipline of the militia.*" Madison Papers, pp. 1355–1363.

The opposition to the creation of a National Militia was led by Gerry, who "was against letting loose the myrmidons of the United States on a State without its own consent." In opposing the new creation he said he "thought this the last point remaining to be surrendered. If it be agreed to by the Convention, the plan will have as black a mark as was set on Cain. He had no such confidence in the general government as some gentlemen possessed, and believed it would be found that the States have not." Dickinson, with equal vehemency, said: "We are come now to a most important matter—that of the sword. His opinion was that the States never would, nor ought to, give up all authority over the militia. He proposed to restrain the general power to one-fourth part at a time, which by rotation would discipline the whole militia." In a more conservative temper Ellsworth said he "was for going as far, in submitting the militia to the general government, as might be necessary. . . . The whole authority over the militia ought by no means to be taken away from the States, whose consequence would pine away

to nothing after such a sacrifice of power. He thought the general authority could not sufficiently pervade the Union for such a purpose, nor could it accommodate itself to the local genius of the people. *It must be vain to ask the States to give the militia out of their hands.*" Madison Papers, pp. 1350–1362.

Thus was the issue sharply defined in the Convention between two factions—the States rights faction contending, in the words of Ellsworth, that it was "vain to ask the States to give the militia out of their hands;" the Nationalists urging, in the words of Pierce Butler, "the necessity of submitting the whole militia to the general authority which had the care of the general defense." The deadlock which thus arose was broken on this, as on many other occasions, by a compromise arranged by a grand committee of the States. (Elliot, V 445.) The partial victory won by the States rights faction was embodied in the concession that the States should continue to retain their militia systems, *subject to a certain degree of Federal control*. That concession was thus expressed in what will be called Group B: "The Congress shall have power . . . to provide for organizing, arranging, and disciplining the [State] militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress."

By that concession thus made to the States rights party in the Convention of 1787, under which the continued existence of the State militia was guaranteed, subject to a certain amount of Federal control—the Nationalists purchased the right to have a National militia, *to be created by Congress*, entirely free from State control. That concession was thus expressed in what will be called Group C: "The Congress shall have power . . . to provide

for calling forth the [national] militia to execute the laws of the Union, suppress insurrections and repel invasions."

The first time Congress ever exercised that power was when it "called forth" the National Militia under the Conscription Act of March 3, 1863, for the expressly declared purpose of suppressing an insurrection.

The second time Congress exercised that power was when it "called forth" the National Militia under the Conscription Act of May 18, 1917, a sustantial reproduction of the first, *so far as conscription is concerned.* As there is no preamble to the last act the National Militia (*euphoniously styled a National Army in order to obscure its real character*), so called forth may be used "to execute the laws of the Union, suppress insurrections and repel invasions," but for no other purposes.

In limiting the use of the National Militia to the three purposes just stated the Convention had of course uppermost in its mind *the exemption of the English militia from service abroad*, which had been a vital part of the English constitution for a thousand years prior to our severance from the mother country. Every member of the Convention knew that the English militia could not be taken across the Channel, that it could only be used AT HOME "*to repel invasions.*" Therefore that ancient formula was transplanted into the Constitution of the United States in the belief, no doubt, that every school boy in the land would understand its meaning and its history.

THE FIRST RECOGNITION BY THIS COURT OF TWO DISTINCT SYSTEMS OF MILITIA, ONE STATE, ONE NATIONAL.

When this subject came for the first time before this Court in Houston *v.* Moore, 5 Wheat. 7, the two distinct systems of militia—the one created and maintained by the States, the other created and maintained by the Federal Government—were recognized and defined in terms so clear

and distinct as to preclude all doubt upon the subject. Mr. Hopkins for the plaintiff in error said in his brief: "The power to govern the militia thus called forth, and employed in the service of the United States, is exclusively in the National Government. *A National Militia grew out of the federal constitution, and did not previously exist. It is in its very nature one indivisible object, and of the utmost importance to the support of the federal authority and government,*" citing Livingston *v.* Van Ingen, 9 Johns. Rep. 507, 565, 575. In accepting that view, and in drawing the line between the new national militia and the pre-existing State militia, the Court said: "But as State militia, the power of the State governments to legislate on the same subjects, having existed prior to the formation of the constitution and not having been prohibited by that instrument, it remains with the States, subordinate nevertheless to the paramount law of the general government, operating upon the same subject. On the other side, it is conceded, that after a detachment of the [State] Militia have been called forth and have entered into the service of the United States, the authority of the general government over such detachment is exclusive. This is also obvious. *Over the national militia, the State governments never had, nor could have jurisdiction. None such is conferred by the Constitution of the United States; consequently none can exist.* . . . It is obvious that there are two ways by which the militia may be called into service; the one is under State authority, *the other under the authority of the United States.*"

In analyzing this case it is all-important to remember that the question directly involved was *the construction of the Act of February 28, 1795.* As stated by the Court itself: "The act of 2d of May, 1792, which is reenacted almost *verbatim* by that of the 28th of February, 1795, authorizes the President of the United States, in case of

invasion, or of imminent danger of it, or when it may be necessary for executing the laws of the United States, or to suppress insurrections, to call forth SUCH NUMBER OF THE MILITIA OF THE STATES [there were no attempts in those early days to *create a national militia as such*] most convenient to the scene of action, as he may judge necessary, and to issue his orders for that purpose to such officers of the militia as he shall think proper. It prescribes the amount of pay and allowances of the militia so called forth, and employed in the service of the United States, and subjects them to the rules and articles of war applicable to the regular troops."

THE FIRST RECOGNITION BY THIS COURT OF EXEMPTION FROM SERVICE ABROAD.

The case of Houston *v.* Moore was followed in due time by that of Martin *v.* Mott, 12 Wheat. 19 (1827), in which a new question, involving the construction of the Act of February 28, 1795, was presented here. That new question was this: Was an exclusive authority vested in the President to decide whether the exigencies had actually arisen, which were contemplated in the Constitution, and in said Act of 1795, authorizing him to call forth the State militia to execute the laws of the Union, suppress insurrections and repel invasions?" In reaching the conclusion that the exclusive authority so to decide was vested in the President, this Court settled a graver question. *It decided that State militia in the service of the United States, as well as national militia, are exempt from service abroad.* In the words of the Court: "The power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action *before the invader himself has reached the soil.* . . . A free people are naturally jealous of the exercise of mili-

tary power, and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without corresponding responsibility. *It is, in its terms,* A LIMITED POWER, *confined to cases* OF ACTUAL INVASION, OR OF IMMINENT DANGER OF INVASION." And so, this Court gave in 1827 a lucid and comprehensive definition of the ancient English formula "*to repel invasions.*" Then it was settled once for all that the militia of the United States, no matter whether State or national, can only be called forth to "repel invasions;" and that "the best means to repel invasion is to provide the requsite force for action *before the invader himself has reached the soil.*" IN OTHER WORDS, AN INVASION CAN ONLY BE REPELLED BY MEN STANDING ON THE SOIL OF THEIR OWN COUNTRY.

THE MOTIVE THAT PROMPTED THE FIRST ATTEMPT TO DESTROY THE EXEMPTION FROM SERVICE ABROAD ESTABLISHED BY SEC. 8, ART. I, OF THE CONSTITUTION.

Eighty years after this Court had, in Martin v. Mott, 12 Wheat. 19, 27, solemnly affirmed the exemption of the militia, State and national, from service abroad, certain lawless people, who claimed that such exemption had become an inconvenience by reason of the territorial expansion, incident to the Spanish-American War, undertook to destroy it by Congressional legislation. With that end in view, the Act of January 21, 1903, was amended by the Act of March 27, 1908, in such a way as to provide that "*the militia so called shall continue to serve during the term so specified, either within* OR WITHOUT THE TERRITORY OF THE UNITED STATES."

By that stupid device such evil-minded persons attempted to make Congress confer upon the President the power to rob the militia of its constitutional exemption from service abroad, in defiance of the elementary principle that the legislative department of the government can-

not confer upon the Executive a power it is expressly forbidden to exercise itself. When such device was submitted by President Taft to Attorney General Wickersham, a learned lawyer, with a thorough knowledge of English and American constitutional law, he trampled upon it in an elaborate official opinion delivered under his oath of office and dated February 17, 1912, in which, among other things, he said:

> "The Constitution, which enumerates the exclusive purposes for which the militia may be called into the service of the United States, affords no warrant for the use of the militia by the general government, except to suppress insurrection, repel invasions, or to execute the laws of the Union. . . . This has always been the English doctrine, and in some instances acts of Parliament have expressly forbidden the use of the militia outside of the Kingdom. Our ancestors, who framed and adopted our Constitution and early laws, got their ideas of a militia, its nature, and purposes from this, and must be taken to have intended substantially the same military body. . . . If authority is needed for the conclusion here reached, the following may suffice: In Ordronaux, Constitutional Legislation, page 501, it is said:
>
> "The Constitution distinctly enumerates the three exclusive purposes for which the militia may be called into the service of the United States. These purposes are: First, to execute the laws of the Union; second, to suppress insurrection; and, third, to repel invasions.
>
> "These three occasions, representing necessities of a strictly domestic character, plainly indicate that the services required of the militia can be rendered ONLY UPON THE SOIL OF THE UNITED STATES OR OF ITS TERRITORIES. . . . IN THE HISTORY OF THIS PROVISION OF THE CONSTITUTION THERE IS NOTHING INDICATING THAT IT WAS EVEN CONTEMPLATED THAT SUCH TROOPS SHOULD BE EMPLOYED FOR PURPOSES OF OFFENSIVE WARFARE OUTSIDE THE LIMITS OF THE UNITED STATES. And it is but just to infer that the enumera-

tion of the specific occasions on which alone the militia can be called into the service of the general government was intended as a distinct limitation upon their employment." . . .

And in Von Holtz, Constitutional Law, page 170, it is said, "the militia cannot be taken out of the country." . . .

It is true that the Act of January 21, 1903, as amended by the Act of March 27, 1908 (35 Stat. 399), provides:

"That whenever the President calls forth the organized militia of any State, Territory, or of the District of Columbia to be employed in the service of the United States he may specify in his call the period for which such service is required, and the militia so called shall continue to serve during the term so specified, either within or without the territory of the United States, unless sooner relieved by order of the President."

But this must be read in view of the constitutional power of Congress to call forth the militia only to suppress insurrection, repel invasions, or to execute the laws of the Union. CONGRESS CAN NOT BY ITS OWN ENACTMENT ENLARGE THE POWER CONFERRED UPON IT BY THE CONSTITUTION; AND IF THIS PROVISION WERE CONSTRUED TO AUTHORIZE CONGRESS TO USE THE ORGANIZED MILITIA FOR ANY OTHER THAN THE THREE PURPOSES SPECIFIED, IT WOULD BE *UNCONSTITUTIONAL*. . . .

I think that the constitutional provision here considered not only affords no warrant for the use of the militia by the General Government, except to suppress insurrection, repel invasions, or to execute the laws of the Union, but, by its careful enumeration of the three occasions or purposes for which the militia may be used, IT FORBIDS SUCH USE FOR ANY OTHER PURPOSE; and your question is answered in the negative.

Respectfully,

GEORGE W. WICKERSHAM.

TO THE SECRETARY OF WAR.

After citing in that opinion the decisions of the Supreme Court of the United States (Houston *v.* Moore, 5 Wheat. 1, and Martin *v.* Mott, 12 Wheat. 19, 27) as irrevocably settling the exemption of the militia from service abroad, the Attorney General exposed, with striking emphasis, the emptiness of the stupid contention that, *although the Congress is expressly forbidden to authorize the sending of the militia, National or State, abroad, it may authorize the President to do so.* Speaking of the act before him which attempted to authorize the President to use the militia "*either within or without the territory of the United States,*" he said: "*If this provision were construed to authorize Congress to use the organized militia for any other than the three purposes specified, it would be unconstitutional.*" Thus, in advance, he put the stamp of nullity upon any clause or phrase in the Conscription Act of May 18, 1917, which may be so construed as to express such an unconstitutional purpose.

EXEMPTION IN QUESTION AGGRESSIVELY AFFIRMED BY PRESIDENT WILSON IN 1916.

After the foregoing opinion of Attorney General Wickersham had become the law of the Department of Justice, and as such binding in this vital matter upon President Wilson, he affirmed it, with great emphasis, in four speeches delivered in January and February, 1916, when he was called upon to explain why he could do no more for the development of the State militia, now euphoniously called the National Guard.

In an address delivered at New York, January 27, 1916, he said: "I believe that it is the duty of Congress to do very much more for the National Guard than it has ever done heretofore. I believe that that great arm *of our national defense* should be built up and encouraged to the utmost; *but, you know*, gentlemen, *that under the Constitu-*

tion of the United States the National Guard is under the direction of more than twoscore States; that it is not permitted to the National Government directly to have a voice in its development and organization; *and that only upon occasion of* ACTUAL INVASION *has the President of the United States the right to ask those men to leave their respective States.*" In an address delivered at Cleveland, Ohio, January 29, 1916, he said: "The President of the United States has not the right to call on these men [the National Guard] except in the case *of actual invasion*, and, therefore, no matter how skillful they are, no matter how ready they are, they are not the instruments for immediate National use." In an address delivered at Milwaukee, January 31, 1916, he said: "The National Guard, fine as it is, *is not subject to the orders of the President of the United States.* It is subject to the orders of the governors of the several States, *and the Constitution itself* says that the President has no right to withdraw them from their States even, *except in the case of actual invasion of the soil of the United States.*" In an address delivered at Topeka, Kansas, February 2, 1916, he said: "*The Constitution of the United States* puts them [the National Guard] under the direct command and control of the governors of the States, not of the President of the United States, and the *national authority has no right to call upon them for any service outside their States unless the territory of the Nation* IS ACTUALLY INVADED."

Thus it appears (1) that in 1827 this Court in a unanimous judgment declared that the militia, State and National, can only be used for one of the three purposes clearly defined in Sec. 8, Art. I, of the Constitution; that to "repel invasions" means "to provide the requisite force for action, *before the invader himself has reached the soil;*" or, in the words of Ordronaux, "the services required of the militia can be rendered *only upon the soil of the United States or its Territories;*" (2) that in 1912, when the expan-

sionists, after the Spanish-American War, attempted to destroy the Constitutional exemption by Congressional legislation, the entire subject was examined by Attorney General Wickersham who trampled upon the stupid device then invented, declaring that the militia, both State and National, is exempt from service abroad; "that the services required of the militia can be rendered *only upon the soil of the United States or its Territories;*" (3) that President Taft, an eminent and experienced constitutional lawyer, at whose instance the Wickersham opinion was prepared, accepted its conclusions as final and unquestionable; (4) that in 1916 President Wilson, recognizing the Wickersham opinion as the law of the Department of Justice and as such binding upon him, solemnly reaffirmed its conclusions in four speeches, now in print, delivered in the months of January and February, 1916.

THE FATHERS SO CONSTRUCTED OUR UNIQUE FEDERAL CONSTITUTION AS TO MAKE US THE STRONGEST OF NATIONS, FOR THE PURPOSES OF NATIONAL DEFENSE, AND THE WEAKEST, FOR THE PURPOSES OF FOREIGN AGGRESSION.

This Court's judicial knowledge, as defined by itself, embraces the entire field occupied by our constitutional and political history, embracing also matters of geography, Keene *v.* McDonough, 8 Pet. 398; Bank of Augusta *v.* Earle, 13 Pet. 519; The Divina Pastora, 4 Wheat. 52; Brown *v.* Piper, 91 U. S. 37; Prize Cases, 2 Black, 635; Sparrow *v.* Strong, 3 Wall. 97; U. S. *v.* Jackson, 104 U. S. 41; Neely *v.* Henkel, 180 U. S. 109. This Court therefore knows judicially that the rock upon which our constitutional life is founded had carved upon it by the fathers themselves this fundamental maxim, "*Never entangle ourselves in the broils of Europe; never suffer Europe to intermeddle with cis-Atlantic affairs.*" In obedience to its own rules this Court must keep constantly before its eyes that fundamental maxim in solving the questions of

constitutional law involved in this case. Just as this Court knows judicially all the historical causes which led up to the Civil War (Cuyler *v.* Ferrill, 6 Fed. Cas. No. 3, 523, 1 Abb. 169), it knows judicially all the historical causes that led up to the making of the existing Constitution of the United States. But so perfectly is the fundamental maxim just stated known of all men—laymen and lawyers, civilians and soldiers—that it will only be necessary to offer in support of it a lucid little book, entitled "*Our Military History, Its Facts and Fallacies*," published in 1916 by a distinguished and law-loving soldier, General Leonard Wood, who now has in his military custody Robert Cox. In his "Foreword" the author says: "Our policy is not one of aggression, but one which looks only to a secure defense. Consequently the arrangements for our military establishment should be limited to the needs of *a secure and certain national defense against foes which may be brought against us.*" After reviewing the histories of the War of the Revolution and the War of 1812, the author says that we have been compelled to fight all our wars WITH VOLUNTEERS, "*because the militia was not available for service outside of the United States.*" He then adds that we had so to conduct the Mexican War "*where the militia could not be used because of the constitutional limitation upon its employment outside of the United States*" (pp. 145-146).

THE SUDDENLY CONSTRUCTED AND PREPOSTEROUS CONTENTION THAT, IN OPEN DEFIANCE OF THE LONG-SETTLED CONSTITUTIONAL EXEMPTION OF THE MILITIA, STATE AND NATIONAL, FROM SERVICE ABROAD, IT MAY BE SENT TO THE BATTLEFIELDS OF EUROPE BY A MERE MILITARY ORDER OF THE PRESIDENT OF THE UNITED STATES.

Our entire fabric of civil liberty rests upon the principle that this is a government of law "as contradistinguished to a government of functionaries." (Lieber, *Civil Liberty and Self-Government*, p. 91.) A famous commentator on

the English Constitution has said: "With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The reports abound with cases in which officials have been brought before the courts and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character, but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person." (Dicey, *The Law of the Constitution*, p. 183.) In United States v. Lee, 106 U. S. 196, this Court, speaking in thunder tones through Mr. Justice Miller, said: "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creations of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other, *but also upon rights in controversy between them and the Government*, and the docket of this Court is crowded with controversies of the latter class."

Inflamed by the passions of war, and apparently unmindful of the Constitution as expounded by this Court and by the Department of Justice, certain persons, WHO DO NOT DARE TO PROPOSE AN AMENDMENT OF THE CONSTITUTION, are now maintaining that the National Militia, *lawfully con-*

scripted and assembled in camps for the highly patriotic purpose of "repelling invasions," may, by a mere Executive order, be transported over thousands of miles of sea to the battlefields of Europe in open defiance of the constitutional exemption from military service abroad. The President himself has stated in a solemn address that "*American armies were never before sent across the seas;*" this Court knows judicially that neither the American people nor the American Congress have uttered one word authorizing the sending of American armies "across the seas." How to give even color or semblance of legality to such a revolutionary proposal has taxed to the utmost the ingenuity of the inventors of the startling proposal in question. Without having seen the Government's brief in these cases, we understand that it will be contended here that the National Militia now in camps was not called forth by Congress under that part of Sec. 8, Art. I, which authorizes that body "To provide for calling forth the [National] Militia *to execute the laws of the Union, suppress insurrections and repel invasions,*" but under that part of Sec. 8, Art. I, which authorizes Congress "To raise and support [volunteer] armies, but no appropriation of money to that use shall be for a longer term than two years" [the English Mutiny Act, by which the standing army of Great Britain, *composed of volunteers,* can be dissolved annually by Parliament. The most notable sponsor for the new theory has stated it in this form: "While the President is Commander in Chief, in the Congress resides the authority 'to raise and support armies' and, 'to provide and maintain a navy,' and, 'to make rules for the government and regulation of the land and naval forces,' and as a safeguard against military domination, the power to raise and support armies is qualified by the provision that 'no appropriation of money to that use shall be for a longer term than two years.' *Otherwise this power is unlimited.*" We will undertake to

expose the utter emptiness of that incongruous jumble of ideas, without any historical or logical basis whatever, in the following order:

1. Under a fundamental canon of construction, recognized from the beginning by this Court, every part of the Constitution which is taken directly from the English is interpreted in the light of its history in the mother country. When in the trial of Burr, for treason, it became necessary for Chief Justice Marshall to define the meaning of the term "levying war" as used in Art. III, Sec. 3, he said: "But the term is not for the first time applied to treason by the Constitution of the United States. It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. *It is scarcely conceivable that the term was not employed by the framers of our Constitution in the sense which had been affixed to it by those from whom we borrowed it.*" This Court has reiterated that obvious and necessary rule in Rhode Island *v.* Mass., 12 Pet. 657; Income Tax Cases, 157 U. S. 429; U. S. *v.* Wong Kim Ark, 169 U. S. 279; and very recently in Gompers *v.* United States, 233 U. S. 604, in which this Court, speaking through Mr. Justice Holmes, has well said: "But the provisions of the Constitution are not mathematical formulas having their essence in their form; *they are organic, living institutions transplanted from English soil.*" And so when the Convention of 1787 determined to vest in Congress the power to create a regular or standing army *on the volunteer system*, in exact imitation of the English regular or standing army, resting then as now on the *volunteer system*, it vested in it the power "To raise and support [volunteer] armies, *but no appropriation of money to that use shall be for a longer term than two years.*" If anything is needed to make what has been said conclusive it is supplied by that part of this provision in italics which is simply a reproduction of the

English Mutiny Act of 1689 by which Parliament can dissolve the regular or standing army of England, *composed of volunteers*, whenever it sees fit. Knowing that it is only authorized to "raise and support [volunteer] armies" under the clause in question, Congress has for *an hundred and twenty-five years "raised and supported" the regular or* VOLUNTEER *army of the United States* by legislation passed under that provision. So notorious is that fact, that even professional soldiers, not jurists, are perfectly familiar with it. In referring to the constitutional provision in question, in his *Military Policy of the United States*, p. 79, Upton says: "Here were laid the foundations of the *volunteer system*, which attained its fullest development during our long Civil War. The 'levies,' known later as '*volunteers*,' were authorized under *the plenary power of Congress to 'raise and support armies*,' and the power of appointing these officers was given the President, to whom it obviously belonged, as the 'levies' *were wholly distinct from the militia*." This Court will see at a glance that the provision in question, *with the English Mutiny Act in its stomach*, under which Congress has always "raised and supported" the *volunteer* armies of the United States, has no more connection with the enactment of the Conscription Act of May 18, 1917, than a clause taken from the Talmud or Pentateuch. The grotesque theory, *suddenly resurrected as a war measure to defeat the constitutional exemption of the National Militia from service abroad*, does not rise to the dignity of an argument.

2. There is no basis of fact whatever for the imputation that when Congress enacted the Conscription Act of May 18, 1917, it attempted to draw its power to do so, not from the clause authorizing it "To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions," upon which was based, *in express terms*, the Conscription Act of March 3, 1863, but

from the clause authorizing it "To raise and support [volunteer] armies, but no appropriation of money to that use shall be for a longer term than two years." To prevent any possible misconception on that branch of the subject the two acts—*the only conscription acts ever passed by Congress*—have been printed in parallel columns in Appendix B hereto. The Court will see at a glance that the Conscription Act of May 18, 1917, is not only a substantial but a close reproduction of the Conscription Act of March 3, 1863, *so far as the conscription clauses are concerned*. Here the fact must be kept steadily in view that the Conscription Act of May 18, 1917, under which the National Militia is now being drafted, is not an original measure; *as appears upon its face it is simply an extension or supplement to carry into effect the National Defense Act of June 3, 1916*. By Sec. 57 of that Act the National Militia is thus defined:

> "COMPOSITION OF THE MILITIA.—The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, AND SAID MILITIA SHALL BE DIVIDED INTO THREE CLASSES, THE NATIONAL GUARD, THE NAVAL MILITIA, AND THE UNORGANIZED MILITIA."

The primary and avowed purpose of the Conscription Act of May 18, 1917, is to organize "*the Unorganized Militia*" of the United States by extending its provisions to "all male citizens or male persons not alien enemies . . . *between the ages of twenty-one and thirty years*." Thus the fact is fixed with mathematical certainty that the Act of May 18, 1917, was passed in order to call out the National Militia, as such, "to execute the laws of the Union, suppress insurrections and repel invasions," first,

because it is really little more than a copy of the first conscription act of March 3, 1863; second, because its avowed purpose is to organize the "*Unorganized Militia*" of the United States by extending its provisions to "all male citizens or male persons not alien enemies . . . *between the ages of twenty-one and thirty years.*" Even a struggle of despair cannot justify the attempt to deny that the Conscription Act of May 18, 1917, was passed under that part of Sec. 8, Art. I, which authorizes Congress to call out the National Militia to "execute the laws of the Union, suppress insurrections and repel invasions."

3. In conclusion, let this question be asked and answered: Did it ever enter into the mind of an American legislator to propose in the Congress of the United States *a conscription law* under that clause of the Constitution which authorizes that body "To raise and support armies," *so that those so conscripted could be incorporated in the ranks of the regular or volunteer army and taken with it beyond the territorial limits of the United States?* Yes, such a measure was offered in the House of Representatives during the War of 1812; and on December 9, 1814, Daniel Webster crushed it in an oration that will live forever. The great orator in describing the character of the act said: "It is an attempt to exercise the power of forcing the free men of this country into the ranks of the Army, *for the general purposes of the war*, under color of a military service. . . . The services of the men to be raised under this act are not limited to those cases in which alone this Government is entitled to the aid of the militia of the States. These cases are particularly stated in the Constitution — 'to repel invasion, suppress insurrection, or execute the laws.' . . . The only section which would have confined the services of the militia proposed to be raised, within the United States, has been stricken out, and if the President should not march them into the Provinces

of England at the North, or of Spain at the South, it will not be because he is prohibited by any provision in this Act . . . *What is this, Sir, but raising a standing army out of the militia by draft, and to be recruited by draft, in like manner, as often as occasions require?* . . . In the present want of men and money, the Secretary of War has proposed to Congress a Military Conscription. For the conquest of Canada the people will not enlist, and if they would the treasury is exhausted and they could not be paid. Conscription is chosen as the most promising instrument, both of overcoming the reluctance to the Service, and of subduing the difficulties which arise from the deficiencies of the exchequer. THE ADMINISTRATION ASSERTS THE RIGHT TO FILL THE RANKS OF THE REGULAR ARMY BY COMPULSION. . . . Congress having, by the Constitution, *a power to raise armies*, the Secretary contends that no restraint is to be imposed on the exercise of this power, except such as is expressly stated in the written letter of the instrument. In other words, that Congress may execute its powers by any means it chooses, unless such means are particularly prohibited."

Here we have, in all its grandeur, the pending contention that under the clause that authorizes Congress "*To raise and support armies*" — that is, regular armies based on the volunteer system — a conscription act may be passed to "*fill the ranks of the Regular Army by compulsion*," such conscripts as a part of the Regular Army being subject of course to service abroad.

In trampling the life out of that deadly assault upon the Constitution he loved so well Webster said: "On the issue of this discussion, I believe the fate of this Government may rest. Its duration is incompatible, in my opinion, with the existence of the measures in contemplation. A crisis has at last arrived, to which the course of things has long tended, and which may be decisive upon

the happiness of present and future generations. If there be anything important in the concerns of men, the considerations which fill the present hour are important. I am anxious above all things to stand acquitted before God, and my conscience, and in the public judgments, of all participation in the counsels which have brought us to our present condition and which now threaten the dissolution of the Government. When the present generation of men shall be swept away and that this Government ever existed shall be a matter of history only, I desire that it may then be known that you have not proceeded in your course unadmonished and unforewarned. Let it then be known that there were those who would have stopped you in the career of your measures, and held you back, as by the skirts of your garments, from the precipice, over which you are plunging, and drawing after the Government of your country. . . .

"*It is time for Congress to examine and decide for itself. It has taken things on trust long enough.* It has followed Executive recommendation till there remains no hope of finding safety in that path. . . .

"Persons thus taken by force and put into an army may be compelled to serve there, during the war, or for life. They may be put on any service, *at home or abroad, for defense or for invasion*, according to the will and pleasure of the Government. This power does not grow out of any invasion of the country, or even out of a state of war. It belongs to Government at all times, in peace as well as war, and is to be exercised under all circumstances according to its mere discretion. This, Sir, is the amount of principle contended for by the Secretary of War.

"Is this, Sir, consistent with the character of a free government? Is this civil liberty? Is this the real character of our constitution? No, Sir, indeed it is not. The Constitution is libelled, foully libelled. The people of

this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their own treasures and their own blood a Magna Charta to be slaves. Where is it written in the Constitution, in what article or section is it contained that you may take children from their parents and parents from their children and compel them to fight the battles of any war which the folly or the wickedness of government may engage in? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest rights of personal liberty? Who will show me any constitutional injunction which makes it the duty of the American people to surrender everything valuable in life, and even life itself, not when the safety of their country and its liberties may demand the sacrifice, but whenever the purposes of an ambitious and mischievous government may require it?

"If the Secretary of War has proved the right of Congress *to enact a law enforcing a draft of men out of the militia into the Regular Army*, he will at any time be able to prove quite as clearly that Congress has power ro create a Dictator. The arguments which have helped him in one case will equally help him in the other."

Thus it appears that the chimerical theory—based upon the assumption that Congress, under the power to "raise and support [volunteer] armies," may conscript into the Regular Army from the militia soldiers, *who may thus be defrauded of their constitutional exemption from service abroad*—is an ancient device constructed during the War of 1812, and trampled to death by Daniel Webster on December 9, 1814. Those who are now striving to lift this dead heresy out of the forgotten grave in which it has slept from that day to this should be careful to explain its paternity.

THE GRAVITY OF THE QUESTION PRESENTED BY THE CASE OF ROBERT COX.

It is impossible to exaggerate the gravity of the question presented by the case of Robert Cox, a native born American youth, who, while affirming the validity of the act under which he has been conscripted, appeals to this Court to secure to him the exemption from military service beyond the territorial limits of the United States solemnly guaranteed by that clause of the Constitution under which the act in question was passed. His case thus involves, first, the oldest and most fundamental right known to English and American constitutional law; second, it involves the lives of hundreds of thousands, perhaps millions, of American youths who, if this sacred right is ignored, may be driven to the battlefields of Europe by a mere Executive order made in open defiance of the Constitution of the United States. Certainly this Court will not pass upon such a momentous question, involving the lives and liberties of hundreds of thousands of American citizens, without exhaustive argument, oral and written, at its bar. The case of Dred Scott involved only the making of slaves freemen; the case of Robert Cox involves, if the foregoing views of Webster are sound, the making of freemen slaves.

All of which is most respectfully submitted.

HANNIS TAYLOR,
JOSEPH E. BLACK,
As Amici Curiæ and as
Counsel for Robert Cox.

APPENDIX B.

THE ONLY TWO CONSCRIPTION LAWS EVER ENACTED BY THE CONGRESS OF THE UNITED STATES.

The *second*, the Act of May 18, 1917, is a substantial reproduction of the *first*, the Act of March 3, 1863, *so far as conscription is concerned.*

The Act of March 3, 1863

An Act for enrolling and calling out the national Forces, and for other Purposes.

Whereas there now exist in the United States AN INSURRECTION AND REBELLION against the authority thereof, and it is, under the Constitution of the United States, the duty of the government TO SUPPRESS INSURRECTION AND REBELLION, to guarantee to each State a republican form of government, and to preserve the public tranquility; and whereas, for these high purposes, a military force is indispensable, to raise and support which all persons ought willingly to contribute; and whereas no service can be more praiseworthy and honorable than that which is rendered for the maintenance of the Constitution and Union, and the consequent preservation of free government: Therefore—

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared on oath their intention to become citizens under and in pursuance of the laws thereof, between the ages of twenty and forty-five years, except as hereinafter excepted, are hereby declared to constitute the national forces, and shall be liable to perform military duty in the service of the United States when called out by the President for that purpose.

SEC. 2. *And be it further enacted*, That the following persons be, and they are hereby, excepted and exempt from the provisions of this act, and shall not be liable to military duty under the same, to wit: Such as are rejected as physically or mentally unfit for the service; also, First the Vice-President of the United

The Act of May 18, 1917

An Act to authorize the President to increase temporarily the Military Establishment of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in view of the existing emergency, which demands the raising of troops in addition to those now available, the President be, and he is hereby, authorized—

First. Immediately to raise, organize, officer, and equip all or such number of increments of the Regular Army provided by the national defense Act approved June third, nineteen hundred and sixteen, or such parts thereof as he may deem necessary; to raise all organizations of the Regular Army, including those added by such increments, to the maximum enlisted strength authorized by law. Vacancies in the Regular Army created or caused by the addition of increments as herein authorized which can not be filled by promotion may be filled by temporary appointment for the period of the emergency or until replaced by permanent appointments or by provisional appointments made under the provisions of section twenty-three of the national defense Act, approved June third, nineteen hundred and sixteen, and hereafter provisional appointments under said section may be terminated whenever it is determined, in the manner prescribed by the President, that the officer has not the suitability and fitness req isite for permanent appointment.

Second. To draft into the military service of the United States, organize, and officer, in accordance with the provisions of section one hundred and eleven of said national defense Act, so far as the provisions of said section may be applicable and not inconsistent with

States, the judges of the various courts of the United States, the heads of the various executive departments of the government, and the governors of the several States. Second, the only son liable to military duty of a widow dependent upon his labor for support. Third, the only son of aged or infirm parent or parents dependent upon his labor for support. Fourth, where there are two or more sons of aged or infirm parents subject to draft, the father, or, if he be dead, the mother, may elect which son shall be exempt. Fifth, the only brother of children not twelve years old, having neither father nor mother dependent upon his labor for support. Sixth, the father of motherless children under twelve years of age dependent upon his labor for support. Seventh, where there are a father and sons in the same family and household, and two of them are in the military service of the United States as non-commissioned officers, musicians, or privates, the residue of such family and household, not exceeding two, shall be exempt. And no persons but such as are herein excepted shall be exempt: *Provided, however*, That no person who has been convicted of any felony shall be enrolled or permitted to serve in said forces.

SEC. 3. *And be it further enacted*, That the national forces of the United States not now in the military service, enrolled under this act, shall be divided into two classes, the first of which shall comprise all persons subject to do military duty between the ages of twenty and thirty-five years, and all unmarried persons subject to do military duty above the age of thirty-five and under the age of forty-five; the second class shall comprise all other persons subject to do military duty, and they shall not, in any district, be called into the service of the United States until those of the first class shall have been called.

SEC. 4. *And be it further enacted*, That, for greater convenience in enrolling, calling out, and organizing the national forces, and for the arrest of deserters and spies of the enemy, the United States shall be divided into districts, of which the District of Columbia shall constitute one, each territory of the United States shall constitute one or more, as the the terms of this Act, any or all members of the National Guard and of the National Guard Reserves, and said members so drafted into the military service of the United States shall serve therein for the period of the existing emergency unless sooner discharged: *Provided*, That when so drafted the organizations or units of the National Guard shall, so far as practicable, retain the State designations of their respective organizations.

Third. To raise by draft as herein provided, organize and equip an additional force of five hundred thousand enlisted men, or such part or parts thereof as he may at any time deem necessary, and to provide the necessary officers, line and staff, for said force and for organizations of the other forces hereby authorized, or by combining organizations of said other forces, by ordering members of the Officers' Reserve Corps to temporary duty in accordance with the provisions of section thirty-eight of the national defense Act approved June third, nineteen hundred and sixteen; by appointment from the Regular Army, the Officers' Reserve Corps, from those duly qualified and registered pursuant to section twenty-three of the Act of Congress approved January twenty-first, nineteen hundred and three (Thirty-second Statutes at Large, page seven hundred and seventy-five), from the members of the National Guard drafted into the service of the United States, from those who have been graduated from educational institutions at which military instruction is compulsory, or from those who have had honorable service in the Regular Army, the National Guard, or in the volunteer forces, or from the country at large; by assigning retired officers of the Regular Army to active duty with such force with their rank on the retired list and the full pay and allowances of their grade; or by the appointment of retired officers and enlisted men, active or retired, of the Regular Army as commissioned officers in such forces: *Provided*, That the organization of said force shall be the same as that of the corresponding organizations of the Regular Army: *Provided further*, That the President is authorized to increase or decrease the number of organ-

President shall direct, and each congressional district of the respective states, as fixed by a law of the state next preceding the enrolment, shall constitute one: *Provided*, That in states which have not by their laws been divided into two or more congressional districts, the President of the United States shall divide the same into so many enrolment districts as he may deem fit and convenient.

SEC. 5. *And be it further enacted*, That for each of said districts there shall be appointed by the President a provost-marshal, with the rank, pay, and emoluments of a captain of cavalry, or an officer of said rank shall be detailed by the President, who shall be under the direction and subject to the orders of a provost-marshal-general, appointed or detailed by the President of the United States, whose office shall be at the seat of government, forming a separate bureau of the War Department, and whose rank, pay, and emoluments shall be those of a colonel of cavalry.

SEC. 6. *And be it further enacted*, That it shall be the duty of the provost-marshal-general, with the approval of the Secretary of War, to make rules and regulations for the government of his subordinates; to furnish them with the names and residences of all deserters from the army, or any of the land forces in the service of the United States, including the militia, when reported to him by the commanding officers; to communicate to them all orders of the President in reference to calling out the national forces; to furnish proper blanks and instructions for enrolling and drafting; to file and preserve copies of all enrolment lists; to require stated reports of all proceedings on the part of his subordinates; to audit all accounts connected with the service under his direction; and to perform such other duties as the President may prescribe in carrying out the provisions of this act.

SEC. 7. *And be it further enacted*, That it shall be the duty of the provost-marshals to arrest all deserters, whether regulars, volunteers, militiamen, or persons called into the service under this or any other act of Congress, wherever they may be found, and to send them to the nearest military commander or military post; to detect, seize, and confine

izations prescribed for the typical brigades, divisions, or army corps of the Regular Army, and to prescribe such new and different organizations and personnel for army corps, divisions, brigades, regiments, battalions, squadrons, companies, troops, and batteries as the efficiency of the service may require: *Provided further*, That the number of organizations in a regiment shall not be increased nor shall the number of regiments be decreased: *Provided further*, That the President in his discretion may organize, officer, and equip for each Infantry and Cavalry brigade three machine-gun companies, and for each Infantry and Cavalry division four machine-gun companies, all in addition to the machine-gun companies comprised in organizations included in such brigades and divisions: *Provided further*, That the President in his discretion may organize for each division one armored motor car machine-gun company. The machine-gun companies organized under this section shall consist of such commissioned and enlisted personnel and be equipped in such manner as the President may prescribe: *And provided further*, That officers with rank not above that of colonel shall be appointed by the President alone, and officers above that grade by the President by and with the advice and consent of the Senate: *Provided further*, That the President may in his discretion recommission in the Coast Guard persons who have heretofore held commissions in the Revenue-Cutter Service or the Coast Guard and have left the service honorably, after ascertaining that they are qualified for service physically, morally, and as to age and military fitness.

Fourth. The President is further authorized, in his discretion and at such time as he may determine, to raise and begin the training of an additional force of five hundred thousand men organized, officered, and equipped, as provided for the force first mentioned in the preceding paragraph of this section.

Fifth. To raise by draft, organize, equip, and officer, as provided in the third paragraph of this section in addition to and for each of the above forces such recruit training units as he may

spies of the enemy, who shall without unreasonable delay be delivered to the custody of the general commanding the department in which they may be arrested, to be tried as soon as the exigencies of the service permit; to obey all lawful orders and regulations of the provost-marshal-general, and such as may be prescribed by law, concerning the enrolment and calling into service of the national forces.

SEC. 8. *And be it further enacted*, That in each of said districts, there shall be a board of enrolment, to be composed of the provost-marshal, as president, and two other persons, to be appointed by the President of the United States, one of whom shall be a licensed and practising physician and surgeon.

SEC. 9. *And be it further enacted*, That it shall be the duty of the said board to divide the district into sub-districts of convenient size, if they shall deem it necessary, not exceeding two, without the direction of the Secretary of War, and to appoint, on or before the tenth day of March next, and in each alternate year thereafter, an enrolling officer for each sub-district, and to furnish him with proper blanks and instructions; and he shall immediately proceed to enroll all persons subject to military duty, noting their respective places of residence, ages on the first day of July following, and their occupation, and shall, on or before the first day of April, report the same to the board of enrolment, to be consolidated into one list, a copy of which shall be transmitted to the provost-marshal-general on or before the first day of May succeeding the enrolment: *Provided, nevertheless*, That if from any cause the duties prescribed by this section cannot be performed within the time specified, then the same shall be performed as soon thereafter as practicable.

SEC. 10. *And be it further enacted*, That the enrolment of each class shall be made separately, and shall only embrace those whose ages shall be on the first day of July thereafter between twenty and forty-five years.

SEC. 11. *And be it further enacted*, That all persons thus enrolled shall be subject, for two years after the first day of July succeeding the enrolment, to be called into the military service of the United deem necessary for the maintenance of such forces at the maximum strength.

Sixth. To raise, organize, officer, and maintain during the emergency such number of ammunition batteries and battalions, depot batteries and battalions, and such artillery parks, with such numbers and grades of personnel as he may deem necessary. Such organizations shall be officered in the manner provided in the third paragraph of this section, and enlisted men may be assigned to said organizations from any of the forces herein provided for or raised by selective draft as by this Act provided.

Seventh. The President is further authorized to raise and maintain by voluntary enlistment, to organize, and equip, not to exceed four infantry divisions, the officers of which shall be selected in the manner provided by paragraph three of section one of this Act: *Provided*, That the organization of said force shall be the same as that of the corresponding organization of the Regular Army: *And provided further*, That there shall be no enlistments in said force of men under twenty-five years of age at time of enlisting: *And provided further*, That no such volunteer force shall be accepted in any unit smaller than a division.

SEC. 2. That the enlisted men required to raise and maintain the organizations of the Regular Army and to complete and maintain the organizations embodying the members of the National Guard drafted into the service of the United States, at the maximum legal strength as by this Act provided, shall be raised by voluntary enlistment, *or if and whenever the President decides that they can not effectually be so raised or maintained, then by selective draft;* and all other forces hereby authorized, except as provided in the seventh paragraph of section one, shall be raised and maintained by selective draft exclusively; but this provision shall not prevent the transfer to any force of training cadres from other forces. Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty-one and thirty years, both inclusive, and shall

States, and to continue in service during the present rebellion, not, however, exceeding the term of three years; and when called into service shall be placed on the same footing, in all respects, as volunteers for three years, or during the war, including advance pay and bounty as now provided by law.

SEC. 12. *And be it further enacted*, That whenever it may be necessary to call out the national forces for military service, the President is hereby authorized to assign to each district the number of men to be furnished by said district; and thereupon the enrolling board shall, under the direction of the President, make a draft of the required number, and fifty per cent. in addition, and shall make an exact and complete roll of the names of the persons so drawn, and of the order in which they were drawn, so that the first drawn may stand first upon the said roll, and the second may stand second, and so on; and the persons so drawn shall be notified of the same within ten days thereafter, by a written or printed notice, to be served personally or by leaving a copy at the last place of residence, requiring them to appear at a designated rendezvous to report for duty. In assigning to the districts the number of men to be furnished therefrom, the President shall take into consideration the number of volunteers and militia furnished by and from the several states in which said districts are situated, and the period of their service since the commencement of the present rebellion, and shall so make said assignment as to equalize the numbers among the districts of the several states, considering and allowing for the numbers already furnished as aforesaid and the time of their service.

SEC. 13. *And be it further enacted*, That any person drafted and notified to appear as aforesaid, may, on or before the day fixed for his appearance, furnish an acceptable substitute to take his place in the draft; or he may pay to such person as the Secretary of War may authorize to receive it, such sum, not exceeding three hundred dollars, as the Secretary may determine, for the procuration of such substitute; which sum shall be fixed at a uniform rate by a general order made at the time of ordering a take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this Act. Quotas for the several States, Territories, and the District of Columbia, or subdivisions thereof, shall be determined in proportion to the population thereof, and credit shall be given to any State, Territory, District, or subdivision thereof, for the number of men who were in the military service of the United States as members of the National Guard on April first, nineteen hundred and seventeen, or who have since said date entered the military service of the United States from any such State, Territory, District, or subdivision, either as members of the Regular Army or the National Guard. All persons drafted into the service of the United States and all officers accepting commissions in the forces herein provided for shall, from the date of said draft or acceptance, be subject to the laws and regulations governing the Regular Army, except as to promotions, so far as such laws and regulations are applicable to persons whose permanent retention in the military service on the active or retired list is not contemplated by existing law, and those drafted shall be required to serve for the period of the existing emergency unless sooner discharged: *Provided*, That the President is authorized to raise and maintain by voluntary enlistment or draft, as herein provided, special and technical troops as he may deem necessary, and to embody them into organizations and to officer them as provided in the third paragraph of section one and section nine of this Act. Organizations of the forces herein provided for, except the Regular Army and the divisions authorized in the seventh paragraph of section one, shall, as far as the interests of the service permit, be composed of men who come, and of officers who are appointed from, the same State or locality.

SEC. 3. No bounty shall be paid to induce any person to enlist in the military service of the United States; and no person liable to military service shall hereafter be permitted or allowed to furnish a substitute for such service; nor shall any substitute be received, enlisted, or enrolled in the military service of the

draft for any state or territory; and thereupon such person so furnishing the substitute, or paying the money shall be discharged from further liability under that draft. And any person failing to report after due service of notice, as herein prescribed, without furnishing a substitute, or paying the required sum therefor, shall be deemed a deserter, and shall be arrested by the provost-marshal and sent to the nearest military post for trial by court-martial, unless, upon proper showing that he is not liable to do military duty, the board of enrolment shall relieve him from the draft.

SEC. 14. *And be it further enacted*, That all drafted persons shall, on arriving at the rendezvous, be carefully inspected by the surgeon of the board, who shall truly report to the board the physical condition of each one; and all persons drafted and claiming exemption from military duty on account of disability, or any other cause, shall present their claims to be exempted to the board, whose decision shall be final.

SEC. 15. *And be it further enacted*, That any surgeon charged with the duty of such inspection who shall receive from any person whomsoever any money or other valuable thing, or agree, directly or indirectly, to receive the same to his own or another's use for making an imperfect inspection or a false or incorrect report, or who shall wilfully neglect to make a faithful inspection and true report, shall be tried by a court-martial, and, on conviction thereof, be punished by fine not exceeding five hundred dollars nor less than two hundred, and be imprisoned at the discretion of the court, and be cashiered, and dismissed from the service.

SEC. 16. *And be it further enacted*, That as soon as the required number of able-bodied men liable to do military duty shall be obtained from the list of those drafted, the remainder shall be discharged; and all drafted persons reporting at the place of rendezvous shall be allowed travelling pay from their places of residence; and all persons discharged at the place of rendezvous shall be allowed travelling pay to their places of residence; and all expenses connected with the enrolment and draft, including subsistence while at the rendezvous, United States; and no such person shall be permitted to escape such service or to be discharged therefrom prior to the expiration of his term of service by the payment of money or any other valuable thing whatsoever as consideration for his release from military service or liability thereto.

SEC. 4. That the Vice-President of the United States, the officers, legislative, executive, and judicial, of the United States and of the several States, Territories, and the District of Columbia, regular or duly ordained ministers of religion, students who at the time of the approval of this Act are preparing for the ministry in recognized theological or divinity schools, and all persons in the military and naval service of the United States shall be exempt from the selective draft herein prescribed; and nothing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant; and the President is hereby authorized to exclude or discharge from said selective draft and from the draft under the second paragraph of section one hereof, or to draft for partial military service only from those liable to draft as in this Act provided, persons of the following classes: County and municipal officials; customhouse clerks; persons employed by the United States in the transmission of the mail; artificers and workmen employed in the armories, arsenals, and navy yards of the United States, and such other persons employed in the service of the United States as the President may designate; pilots, mariners actually employed in the sea service of any citizen or merchant within the United States; persons engaged in industries, including agriculture, found to be necessary to the maintenance of

shall be paid from the appropriation for enrolling and drafting, under such regulations as the President of the United States shall prescribe; and all expenses connected with the arrest and return of deserters to their regiments, or such other duties as the provost-marshal shall be called upon to perform, shall be paid from the appropriation for arresting deserters, under such *such* regulations as the President of the United States shall prescribe: *Provided*, The provost-marshals shall in no case receive commutation for transportation or for fuel and quarters, but only for forage, when not furnished by the government, together with actual expenses of postage, stationery, and clerk hire authorized by the provost-marshal-general.

SEC. 17. *And be it further enacted*, That any person enrolled and drafted according to the provisions of this act who shall furnish an acceptable substitute, shall thereupon receive from the board of enrolment a certificate of discharge from such draft, which shall exempt him from military duty during the time for which he was drafted; and such substitute shall be entitled to the same pay and allowances provided by law as if he had been originally drafted into the service of the United States.

SEC. 18. *And be it further enacted*, That such of the volunteers and militia now in the service of the United States as may reenlist to serve one year, unless sooner discharged, after the expiration of their present term of service, shall be entitled to a bounty of fifty dollars, one-half of which to be paid upon such reënlistment, and the balance at the expiration of the term of reënlistment; and such as may reënlist to serve for two years, unless sooner discharged, after the expiration of their present term of enlistment, shall receive, upon such reenlistment, twenty-five dollars of the one hundred dollars bounty for enlis ment provided by the fifth section of the act approved twenty-second of July, eighteen hundred and six'y-one, entitled "An act to authorize the employment of volunteers to aid in enforcing the laws and protecting public property."

SEC. 19. *And be it further enacted*, That whenever a regiment of volunteers of the same arm, from the same State, is re-

the Military Establishment or the effective operation of the military forces or the maintenance of national interest during the emergency; those in a status with respect to persons dependent upon them for support which renders their exclusion or discharge advisable; and those found to be physically or morally deficient. No exemption or exclusion shall continue when a cause therefor no longer exists: *Provided*, That notwithstanding the exemptions enumerated herein, each State, Territory, and the District of Columbia shall be required to supply its quota in the proportion that its population bears to the total population of the United States.

The President is hereby authorized, in his discretion, to create and establish throughout the several States and subdivisions thereof and in the Territories and the District of Columbia local boards and where, in his discretion, practicable and desirable, there shall be created and established one such local board in each county or similar subdivision in each State, and one for approximately each thirty thousand of population in each city of thirty thousand population or over, according to the last census taken or estimates furnished by the Bureau of Census of the Department of Commerce. Such boards shall be appointed by the President, and shall consist of three or more members, none of whom shall be connected with the Military Establishment, to be chosen from among the local authorities of such subdivisions or from other citizens residing in the subdivision or area in which the respective boards will have jurisdiciton under the rules and regulations prescribed by the President. Such boards shall have power within their respective jurisdictions to hear and determine, subject to review as hereinafter provided, all questions of exemption under this Act, and all questions of or claims for including or discharging individuals or classes of individuals from the selective draft, which shall be made under rules and regulations prescribed by the President, except any and every question or claim for including or excluding or discharging persons or classes of persons from the selective draft under the provisions of this Act authorizing the Presi-

duced to one-half the maximum number prescribed by law, the President may direct the consolidation of the companies of such regiment: *Provided*, That no company so formed shall exceed the maximum number prescribed by law. When such consolidation is made, the regimental officers shall be reduced in proportion to the reduction in the number of companies.

SEC. 20. *And be it further enacted*, That whenever a regiment is reduced below the minimum number allowed by law, no officers shall be appointed in such regiment beyond those necessary for the command of such reduced number.

SEC. 21. *And be it further enacted*, That so much of the fifth section of the act approved seventeenth July, eighteen hundred and sixty-two, entitled, "An act to amend an act calling forth the militia to execute the laws of the Union," and so forth, as requires the approval of the President to carry into execution the sentence of a court-martial be, and the same is hereby, repealed, as far as relates to carrying into execution the sentence of any court-martial against any person convicted as a spy or deserter, or of mutiny or murder; and hereafter sentences in punishment of these offences may be carried into execution upon the approval of the commanding general in the field.

SEC. 22. *And be it further enacted*, That courts-martial shall have power to sentence officers who shall absent themselves from their commands without leave, to be reduced to the ranks or to serve three years or during the war.

SEC. 23. *And be it further enacted*, That the clothes, arms, military outfits, and accoutrements furnished by the United States to any soldier, shall not be sold, bartered, exchanged, pledged, loaned, or given away; and no person not a soldier, or duly authorized officer of the United States, who has possession of any such clothes, arms, military outfits, or accoutrements, furnished as aforesaid, and which have been the subjects of any such sale, barter, exchange, pledge, loan, or gift, shall have any right, title, or interest therein; but the same may be seized and taken wherever found by any officer of the United States, civil or military, and shall thereupon be delivered to any quartermaster, or other officer authorized

dent to exclude or discharge from the selective draft "Persons engaged in industries, including agriculture, found to be necessary to the maintenance of the Military Establishment, or the effective operation of the military forces, of the maintenance of national interest during the emergency."

The President is hereby authorized to establish additional boards, one in each Federal judicial district of the United States, consisting of such number of citizens, not connected with the Military Establishment, as the President may determine, who shall be appointed by the President. The President is hereby authorized, in his discretion, to establish more than one such board in any Federal judicial district of the United States, or to establish one such board having jurisdiction of an area extending into more than one Federal judicial district.

Such district boards shall review on appeal and affirm, modify, or reverse any decision of any local board having jurisdiction in the area in which any such district board has jurisdiction under the rules and regulations prescribed by the President. Such district boards shall have exclusive original jurisdiction within their respective areas to hear and determine all questions or claims for including or excluding or discharging persons or classes of persons from the selective draft, under the provisions of this Act, not included within the original jurisdiction of such local boards.

The decisions of such district boards shall be final except that, in accordance with such rules and regulations as the President may prescribe, he may affirm, modify or reverse any such decision.

Any vacancy in any such local board or district board shall be filled by the President, and any member of any such local board or district board may be removed and another appointed in his place by the President, whenever he considers that the interest of the nation demands it.

The President shall make rules and regulations governing the organization and procedure of such local boards and district boards, and providing for and governing appeals from such local boards to such district boards, and reviews of

to receive the same; and the possession of any such clothes, arms, military outfits, or accoutrements, by any person not a soldier or officer of the United States, shall be *primâ facie* evidence of such a sale, barter, exchange, pledge, loan, or gift, as aforesaid.

SEC. 24. *And be it further enacted*, That every person not subject to the rules and articles of war who shall procure or entice, or attempt to procure and entice, a soldier in the service of the United States to desert; or who shall harbor, conceal, or give employment to a deserter, or carry him away, or aid in carrying him away, knowing him to be such; or who shall purchase from any soldier his arms, equipments, ammunition, uniform, clothing, or any part thereof; and any captain or commanding officer of any ship or vessel, or any superintendent or conductor of any railroad, or any other public conveyance, carrying away any such soldier as one of his crew or otherwise, knowing him to have deserted, or shall refuse to deliver him up to the orders of his commanding officer, shall, upon legal conviction, be fined, at the discretion of any court having cognizance of the same, in any sum not exceeding five hundred dollars, and be shall be imprisoned not exceeding two years nor less than six months.

SEC. 25. *And be it further enacted*, That if any person shall resist any draft of men enrolled under this act into the service of the United States, or shall counsel or aid any person to resist any such draft; or shall assault or obstruct any officer in making such draft, or in the performance of any service in relation thereto; or shall counsel any person to assault or obstruct any such officer, or shall counsel any drafted man not to appear at the place of rendezvous, or wilfully dissuade them from the performance of military duty as required by law, such person shall be subject to summary arrest by the provost-marshal, and shall be forthwith delivered to the civil authorities, and, upon conviction thereof, be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding two years, or by both of said punishments.

SEC. 26. *And be it further enacted*, That immediately after the passage of this act, the President shall issue his proclamation stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act upon the publication of said proclamation or other notice as aforesaid given by the President or by his direction; and any person who shall willfully fail or refuse to present himself for registration or to submit thereto as herein provided, shall be guilty of a misdemeanor and shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and shall thereupon be duly registered: *Provided*, That in the call of the docket precedence shall be given, in courts trying the same, to the trial of criminal proceedings under this Act: *Provided further*, That persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this Act provided: *Provided*

the decisions of any local board by the district board having jurisdiction, and determining and prescribing the several areas in which the respective local boards and district boards shall have jurisdiction, and all other rules and regulations necessary to carry out the terms and provisions of this section, and shall provide for the issuance of certificates of exemption, or partial or limited exemptions, and for a system to exclude and discharge individuals from selective draft.

SEC. 5. That all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act upon the publication of said proclamation or other notice as aforesaid given by the President or by his direction; and any person who shall willfully fail or refuse to present himself for registration or to submit thereto as herein provided, shall be guilty of a misdemeanor and shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and shall thereupon be duly registered: *Provided*, That in the call of the docket precedence shall be given, in courts trying the same, to the trial of criminal proceedings under this Act: *Provided further*, That persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this Act provided: *Provided*

mation declaring that all soldiers now absent from their regiments without leave may return within a time specified to such place or places as he may indicate in his proclamation, and be restored to their respective regiments without punishment, except the forfeiture of their pay and allowances during their absence; and all deserters who shall not return within the time so specified by the President shall, upon being arrested, be punished as the law provides.

SEC. 27. *And be it further enacted*, That depositions of witnesses residing beyond the limits of the state, territory, or district in which military courts shall be ordered to sit, may be taken in cases not capital by either party, and read in evidence; provided the same shall be taken upon reasonable notice to the opposite party, and duly authenticated.

SEC. 28. *And be it further enacted*, That the judge advocate shall have power to appoint a reporter, whose duty it shall be to record the proceedings of and testimony taken before military courts instead of the judge advocate; and such reporter may take down such proceedings and testimony in the first instance in shorthand. The reporter shall be sworn or affirmed faithfully to perform his duty before entering upon it.

SEC. 29. *And be it further enacted*, That the court shall, for reasonable cause, grant a continuance to either party for such time and as often as shall appear to be just: *Provided*, That if the prisoner be in close confinement, the trial shall not be delayed for a period longer than sixty days.

SEC. 30. *And be it further enacted*, That in time of war, insurrection, or rebellion, murder, assault and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit rape, and larceny, shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the articles of war; and the punishments for such offences shall never be less than those inflicted by the laws of the state, *further*, That in the case of temporary absence from actual place of legal residence of any person liable to registration as provided herein such registration may be made by mail under regulations to be prescribed by the President.

SEC. 6. That the President is hereby authorized to utilize the service of any or all departments and any or all officers or agents of the United States and of the several States, Territories, and the District of Columbia, and subdivisions thereof, in the execution of this Act, and all officers and agents of the United States and of the several States, Territories, and subdivisions thereof, and of the District of Columbia, and all persons designated or appointed under regulations prescribed by the President whether such appointments are made by the President himself or by the governor or other officer of any State or Territory to perform any duty in the execution of this Act, are hereby required to perform such duty as the President shall order or direct, and all such officers and agents and persons so designated or appointed shall hereby have full authority for all acts done by them in the execution of this Act by the direction of the President. Correspondence in the execution of this Act may be carried in penalty envelopes bearing the frank of the War Department. Any person charged as herein provided with the duty of carrying into effect any of the provisions of this Act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty; and any person charged with such duty or having and exercising any authority under said Act, regulations, or directions, who shall knowingly make or be a party to the making of any false or incorrect registration, physical examination, exemption, enlistment, enrollment, or muster; and any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this Act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this Act or of said regulations, or who in any manner, shall fail or neglect fully

territory, or district in which they may have been committed.

SEC. 31. *And be it further enacted*, That any officer absent from duty with leave, except for sickness or wounds, shall, during his absence, receive half of the pay and allowances prescribed by law, and no more; and any officer absent without leave shall, in addition to the penalties prescribed by law or a court-martial, forfeit all pay or allowances during such absence.

SEC. 32. *And be it further enacted*, That the commanders of regiments and of batteries in the field, are hereby authorized and empowered to grant furloughs for a period not exceeding thirty days at any one time to five per centum of the non-commissioned officers and privates, for good conduct in the line of duty, and subject to the approval of the commander of the forces of which such non-commissioned officers and privates form a part.

SEC. 33. *And be it further enacted*, That the President of the United States is hereby authorized and empowered, during the present rebellion, to call forth the national forces, by draft, in the manner provided for in this act.

SEC. 34. *And be it further enacted*, That all persons drafted under the provisions of this act shall be assigned by the President to military duty in such corps, regiments, or other branches of the service as the exigencies of the service may require.

SEC. 35. *And be it further enacted*, That hereafter details to special service shall only be made with the consent of the commanding officer of forces in the field; and enlisted men, now or hereafter detailed to special service, shall not receive any extra pay for such services beyond that allowed to other enlisted men.

SEC. 36. *And be it further enacted*, That general orders of the War Department, numbered one hundred and fifty-four and one hundred and sixty-two, in reference to enlistments from the volunteers into the regular service, be, and the same are hereby, rescinded; and hereafter no such enlistments shall be allowed.

SEC. 37. *And be it further enacted*, That the grades created in the cavalry forces to perform any duty required of him in the execution of this Act, shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to military law, shall be tried by court-martial and suffer such punishment as a court-martial may direct.

SEC. 7. That the qualifications and conditions for voluntary enlistment as herein provided shall be the same as those prescribed by existing law for enlistments in the Regular Army, except that recruits must be between the ages of eighteen and forty years, both inclusive, at the time of their enlistment; and such enlistments shall be for the period of the emergency unless sooner discharged. All enlistments, including those in the Regular Army Reserve, which are in force on the date of the approval of this Act and which would terminate during the emergency shall continue in force during the emergency unless sooner discharged; but nothing herein contained shall be construed to shorten the period of any existing enlistment: *Provided*, That all persons enlisted or drafted under any of the provisions of this Act shall as far as practicable be grouped into units by States and the political subdivisions of the same: *Provided further*, That all persons who have enlisted since April first, nineteen hundred and seventeen, either in the Regular Army or in the National Guard, and all persons who have enlisted in the National Guard since June third, nineteen hundred and sixteen, upon their application, shall be discharged upon the termination of the existing emergency.

The President may provide for the discharge of any or all enlisted men whose status with respect to dependents renders such discharge advisable; and he may also authorize the employment on any active duty of retired enlisted men of the Regular Army, either with their rank on the retired list or in higher enlisted grades, and such retired enlisted men shall receive the full pay and allowances of the grades in which they are actively employed.

of the United States by section eleven of the act approved seventeenth July, eighteen hundred and sixty-two, and for which no rate of compensation has been provided, shall be paid as follows, to wit: Regimental commissary the same as regimental quartermaster; chief trumpeter the same as chief bugler, sad[d]ler-sergeant the same as regimental commissary-sergeant; company commissary-sergeant the same as company quartermaster's sergeant: *Provided*, That the grade of supernumerary second lieutenant, and two teamsters for each company, and one chief farrier and blacksmith for for each regiment, as allowed by said section of that act, be, and they are hereby, abolished; and each cavalry company may have two trumpeters, to be paid as buglers; and each regiment shall have one veterinary surgeon, with the rank of a regimental sergeant-major, whose compensation shall be seventy-five dollars per month.

SEC. 38. *And be it further enacted*, That all persons who, in time of war or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial or military commission, and shall, upon conviction, suffer death.

APPROVED, March 3, 1863.

SEC. 8. That the President, by and with the advice and consent of the Senate, is authorized to appoint for the period of the existing emergency such general officers of appropriate grade as may be necessary for duty with brigades, divisions, and higher units in which the forces provided for herein may be organized by the President, and general officers of appropriate grade for the several Coast Artillery districts. In so far as such appointments may be made from any of the forces herein provided for, the appointees may be selected irrespective of the grades held by them in such forces. Vacancies in all grade in the Regular Army resulting from the appointment of officers thereof to higher grades in the forces other than the Regular Army herein provided for shall be filled by temporary promotions and appointments in the manner prescribed for filling temporary vacancies by section one hundred and fourteen of the national defense Act approved June third, nineteen hundred and sixteen; and officers appointed under the provisions of this Act to higher grade in the forces other than the Regular Army herein provided for shall not vacate their permanent commissions nor be prejudiced in their relative or lineal standing in the Regular Army.

SEC. 9. That the appointments authorized and made as provided by the second, third, fourth, fifth, sixth, and seventh paragraphs of section one and by section eight of this Act, and the temporary appointments in the Regular Army authorized by the first paragraph of section one of this Act, shall be for the period of the emergency, unless sooner terminated by discharge or otherwise. The President is hereby authorized to discharge any officer from the office held by him under such appointment for any cause which, in the judgment of the President, would promote the public service, and the general commanding any division and higher tactical organization or territorial department is authorized to appoint from time to time military boards of not less than three nor more than five officers of the forces herein provided for to examine into and report upon the capacity, qualification, conduct, and efficiency of any com-

missioned officer within his command other than officers of the Regular Army holding permanent or provisional commissions therein. Each member of such board shall be superior in rank to the officer whose qualifications are to be inquired into, and if the report of such board be adverse to the continuance of any such officer and be approved by the President, such officer shall be discharged from the service at the discretion of the President with one month's pay and allowances.

SEC. 10. That all officers and enlisted men of the forces herein provided for other than the Regular Army shall be in all respects on the same footing as to pay, allowances, and pensions as officers and enlisted men of corresponding grades and length of service *in the Regular Army;* and commencing June one, nineteen hundred and seventeen, and continuing until the termination of the emergency, all enlisted men of the Army of the United States in active service whose base pay does not exceed $21 per month shall receive an increase of $15 per month; those whose base pay is $24, an increase of $12 per month; those whose base pay is $30, $36, or $40, an increase of $8 per month; and those whose base pay is $45 or more, an increase of $6 per month: *Provided*, That the increases of pay herein authorized shall not enter into the computation of the continuous-service pay.

SEC. 11. That all existing restrictions upon the detail, detachment, and employment of officers and enlisted men of the Regular Army are hereby suspended for the period of the present emergency.

SEC. 12. That the President of the United States, as Commander in Chief of the Army, is authorized to make such regulations governing the prohibition of alcoholic liquors in or near military camps and to the officers and enlisted men of the Army as he may from time to time deem necessary or advisable: *Provided*, That no person, corporation, partnership, or association shall sell, supply, or have in his or its possession any intoxicating or spirituous liquors at any military station, cantonment, camp, fort, post, officers' or enlisted men's club, which is being used at the time for mili-

tary purposes under this Act, but the Secretary of War may make regulations permitting the sale and use of intoxicating liquors for medicinal purposes. It shall be unlawful to sell any intoxicating liquor, including beer, ale, or wine, to any officer or member of the military forces while in uniform, except as herein provided. Any person, corporation, partnership, or association violating the provisions of this section or the regulations made thereunder shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000 or imprisonment for not more than twelve months, or both.

SEC. 13. That the Secretary of War is hereby authorized, empowered, and directed during the present war to do everything by him deemed necessary to suppress and prevent the keeping or setting up of houses of ill fame, brothels, or bawdy houses within such distance as he may deem needful of any military camp, station, fort, post, cantonment, training, or mobilization place, and any person, corporation, partnership, or association receiving or permitting to be received for immoral purposes any person into any place, structure, or building used for the purpose of lewdness, assignation, or prostitution within such distance of said places as may be designated or shall permit any such person to remain for immoral purposes in any such place, structure, or building as aforesaid, or who shall violate any order, rule, or regulation issued to carry out the object and purpose of this section shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000, or imprisonment for not more than twelve months, or both.

SEC. 14. That all laws and parts of laws in conflict with the provisions of this Act are hereby suspended during the period of this emergency.

APPROVED, May 18, 1917.